

PROCEEDINGS
OF THE
American Society of International Law
AT ITS
TWENTY-FIFTH ANNUAL MEETING
HELD AT
WASHINGTON, D. C.
APRIL 23-25, 1931

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CONSTITUTION
OF THE
AMERICAN SOCIETY OF INTERNATIONAL LAW¹
(Revision of April 25, 1925.)

ARTICLE I

Name

This Society shall be known as the American Society of International Law.

ARTICLE II

Object

The object of this Society is to foster the study of international law and promote the establishment of international relations on the basis of law and justice. For this purpose it will coöperate with other societies in this and other countries having the same object.

ARTICLE III

Membership

Members may be elected on the nomination of two members in regular standing by vote of the Executive Council under such rules and regulations as the Council may prescribe.

Each member shall pay annual dues of five dollars and shall thereupon become entitled to all the privileges of the Society, including a copy of the *American Journal of International Law* issued during the year. Upon failure to pay the dues for the period of one year a member may, in the discretion of the Executive Council, be suspended or dropped from the rolls of membership.

Upon payment of one hundred dollars any person otherwise entitled to membership may become a life-member and shall thereupon become entitled to all the privileges of membership during his life.

A limited number of persons not citizens of the United States and not exceeding one in any year, who shall have rendered distinguished service to the cause which this Society is formed to promote, may be elected to honorary membership at any meeting of the Society on the recommendation

¹ The history of the origin and organization of the American Society of International Law can be found in the Proceedings of the First Annual Meeting at p. 23. The Constitution was adopted January 12, 1906.

of the Executive Council. Honorary members shall have all the privileges of membership, but shall be exempt from the payment of dues.

ARTICLE IV

Officers

The officers of the Society shall consist of a President, an Honorary President, three Vice-Presidents, such number of Honorary Vice-Presidents as may be fixed from time to time by the Executive Council, a Secretary,¹ and a Treasurer, all of whom shall be elected annually, and of an Executive Council composed of the foregoing officers, *ex officio*, and twenty-four elected members, whose terms of office shall be three years, except that of those elected at the first election, eight shall serve for the period of one year only and eight for the period of two years, and that any one elected to fill a vacancy shall serve only for the unexpired term of the member in whose place he is chosen. No elected member of the Executive Council shall be eligible for reelection until the next annual meeting after that at which his term of office expires.

The Secretary¹ and the Treasurer shall be elected by the Executive Council. The other officers of the Society shall be elected by the Society, except as hereinafter provided for the filling of vacancies occurring between elections.

At every annual election candidates for all offices to be filled by the Society at such election shall be placed in nomination by a Nominating Committee, which shall consist of the five members of the Society receiving the highest number of ballots cast by the members at the first session of the Annual Meeting of the Society. The Executive Council may submit a list of nominees.

All officers shall be elected by a majority vote of members present and voting.

All officers of the Society shall serve until their successors are chosen.

ARTICLE V

Duties of Officers

1. The President shall preside at all meetings of the Society and of the Executive Council and shall perform such other duties as the Council may assign to him. In the absence of the President at any meeting of the Society his duties shall devolve upon one of the Vice-Presidents to be designated by the Executive Council, or by vote of the Society.

2. The Secretary¹ shall keep the records and conduct the correspondence of the Society and of the Executive Council and shall perform such other duties as the Council may assign to him.

¹ As amended April 26, 1930.

3. The Treasurer shall receive and have the custody of the funds of the Society and shall disburse the same subject to the rules and under the direction of the Executive Council. The fiscal year shall begin on the first day of January.

4. The Executive Council shall have charge of the general interests of the Society, shall call regular and special meetings of the Society and arrange the programs therefor, shall appropriate money, shall appoint from among its members an Executive Committee and other committees and their chairman, with appropriate powers, and shall have full power to issue or arrange for the issue of a periodical or other publications, and in general possess the governing power in the Society, except as otherwise specifically provided in this Constitution. The Executive Council shall have the power to fill vacancies in its membership occasioned by death, resignation, failure to elect, or other cause, such appointees to hold office until the next annual election.

Nine members shall constitute a quorum of the Executive Council, and a majority vote of those in attendance shall control its decisions.

5. The Executive Committee shall have full power to act for the Executive Council when the Executive Council is not in session.

6. The Executive Council shall elect a Chairman, who shall preside at its meetings in the absence of the President, and who shall also be Chairman of the Executive Committee.

ARTICLE VI

Meetings

The Society shall meet annually at a time and place to be determined by the Executive Council for the election of officers and the transaction of such other business as the Council may determine.

Special meetings may be held at any time and place on the call of the Executive Council or at the written request of thirty members on the call of the Secretary. At least ten days' notice of such special meeting shall be given to each member of the Society by mail, specifying the object of the meeting, and no other business shall be considered at such meeting.

Twenty-five members shall constitute a quorum at all regular and special meetings of the Society and a majority vote of those present and voting shall control its decisions.

ARTICLE VII

Resolutions

All resolutions relating to the principles of international law or to international relations which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members,

be referred to the appropriate committee or the Council, and no vote shall be taken until a report shall have been made thereon.

ARTICLE VIII

Amendments

This Constitution may be amended at any annual meeting of the Society by a two-thirds vote of the members present and voting. Amendments to the Constitution may be proposed by the Council, or by a communication in writing signed by at least five members of the Society and deposited with the Secretary¹ within ten months after the previous annual meeting, and any amendments so deposited shall be reported upon by the Council at the succeeding annual meeting. All proposed amendments shall be submitted in writing to the members of the Society at least ten days before the meeting at which they are to be voted upon and no amendment shall be voted upon until the Council shall have made a report thereon to the Society.

¹ As amended April 26, 1930.

REGULATIONS OF THE EXECUTIVE COUNCIL REGARDING THE EDITING AND
PUBLICATION OF THE AMERICAN JOURNAL OF INTERNATIONAL LAW

Adopted May 22, 1924

1. There shall be a Board of Editors charged with the general supervision of editing the *American Journal of International Law* and determining general matters of policy in relation thereto.

2. The Board shall be elected annually by the Executive Council.¹

3. Membership upon the Board of Editors shall involve, in addition to the duties otherwise prescribed herein, obtaining articles and other material for publication, the preparation of contributions, especially editorial comments and book reviews, and the examination of and giving advice upon the suitability for publication of articles prepared by non-members of the Board. The minimum number of contributions which each Editor shall be called upon to contribute or obtain for publication in the *Journal* is to be determined by the Board.²

4. There may be an Honorary Editor-in-Chief elected by the Council; and there shall be an Editor-in-Chief and a Managing Editor to be elected annually from among the members of the Board by the Executive Council, and to serve until their successors assume office.

The Editor-in-Chief shall call and preside at all meetings of the Board of Editors, and when the Board is not in session he shall determine matters of policy regarding the contents of the *Journal*.

The Managing Editor shall have charge of the publication of the *Journal*, shall receive contributions and other material for publication, including books for review, and conduct the correspondence regarding the same.

In the event of the temporary inability of the Editor-in-Chief to serve, his duties shall be performed by the Managing Editor, unless the Editor-in-Chief shall designate an acting Editor-in-Chief.

5. The *Journal* shall be made up of leading articles, editorial comments, a chronicle of international events, a list of public documents relating to international law, judicial decisions involving questions of international law, book reviews and notes, a list of periodical literature relating to international law, and a supplement.

(a) Before publication all articles shall receive the approval of two members of the Board. In case an article is rejected by one editor, the question of its submission to another editor shall be decided by the Editor-in-Chief. Articles by members of the Board of Editors shall be submitted to the Editor-in-Chief, who shall decide as to their publication.

(b) Editorial comments must be written and signed by the members of the Board of Editors, and shall be published without submission to any other editor, except that they shall be governed by the provisions of Paragraph 6 hereof. Current notes of international events, containing no com-

¹ As amended April 24, 1926 and April 25, 1929.

² As amended April 25, 1929.

ment, may be printed over the signatures of non-members of the Board of Editors in the discretion of the Managing Editor.

(c) In the department of judicial decisions, preference in publication shall be given to the texts of decisions of international courts and arbitral awards which are not printed in a regular series of publications available for public distribution. This department may also contain the texts of decisions of the Supreme Court of the United States and the highest courts of other nations involving important questions of international law. Comments upon court decisions, either those printed in the *Journal*, or those not of sufficient importance to print textually, may be supplied by members of the Board of Editors, and shall be printed as editorial comments or current notes.

(d) The chronicle of international events, and the lists of public documents relating to international law and periodical literature of international law, shall be prepared under the direction of the Managing Editor.

(e) The supplement shall be made up of the texts of important treaties and other official documents. Material for it shall be supplied by the Managing Editor, taking into consideration such suggestions from the members of the Board as they may have to offer from time to time.

6. The final make-up of each number of the *Journal* shall be submitted by the Managing Editor to the Editor-in-Chief, who shall have the power to veto the publication of any contribution or other material. In the absence of such a veto, the Managing Editor shall be authorized to publish the *Journal*, using approved material so far as approval is prescribed herein.

7. The *Journal* shall be published upon the 15th days of January, April, July and October, or as near to those dates as possible, and the Managing Editor shall have power to proceed with the publication of the *Journal* from the materials in his hand upon the first day of the month preceding the month of publication.

8. The Managing Editor shall receive such compensation for his services, and such allowance for clerical assistance, as may be fixed by the Executive Council.

TWENTY-FIFTH ANNUAL MEETING
OF THE
AMERICAN SOCIETY OF INTERNATIONAL LAW
THE WILLARD HOTEL, WASHINGTON, D. C.
APRIL 23-25, 1931

FIRST SESSION

Thursday, April 23, 1931, 8.30 o'clock p. m.

President JAMES BROWN SCOTT. Ladies and gentlemen, the 25th annual meeting of the American Society of International Law will please come to order. We shall proceed at once to the first item on the program, which happens to be the annual address by the President; but before speaking upon the topic of the address I should like to read a letter from him who was our first president, who served as president during a period of 17 years, and to whom is due the success of the Society during the long and illustrious period of his presidency, Mr. Elihu Root. It was hoped that he would appear in person, and he intimated more than a desire to be present with us, but for reasons stated in a letter from him which I hold in my hand, and with which I think the proceedings may most appropriately begin, the reasons are explained. The letter is as follows:

998 FIFTH AVENUE

March 6, 1931

MY DEAR SCOTT:

If I were as young and ardent as the present Lord Chief Justice of the United States I would go to the twenty-fifth anniversary meeting of the American Society of International Law and would close the meeting by making unduly extended remarks. I am, however, too old to act like an electron, which seems naturally to go rushing around bumping into other people. I must accordingly stay at home and confine my participation in the celebration to sending my congratulations to the Society upon its sincere and fruitful work and the results.

Twenty-five years ago you could almost count on your fingers the people in the United States who knew or cared anything about international law. The formation of the American Society of International Law gave one of the great initial impulses towards laying the foundation of knowledge and understanding necessary for a democracy which is to take an active part in the affairs of the community of nations. During the twenty-five years which have passed the increase of popular interest in international law and in the study of it has been extraordinary and most gratifying.

The reason why the Society of International Law has lived and prospered is that it answered to a real need. Of course the process has only just begun. The need continues and the Society must continue with its active and unwearied industry. By virtue of its early entrance on the field it has beyond anybody else the finest thing in all the world, a real practical opportunity to contribute substantially to the advance of civilization.

Faithfully yours,

ELIHU ROOT

DR. JAMES BROWN SCOTT, President,
American Society of International Law,
700 Jackson Place,
Washington, D. C.

The PRESIDENT. The subject of the President's address this evening, "The progress of international law during the last twenty-five years," is a subject which has been wished upon me. It is not of my own choosing. It has been assigned to me by the program committee. It would be impossible or wearisome to trace the leading events chronologically during the period of a quarter of a century. It has seemed wise, therefore, to choose special episodes and to dwell upon them a little more at length. Necessarily the choice of one would not be the choice of another, but such as mine is I lay it before you.

Last year I was able to confine the remarks which I made to twenty minutes. I would gladly do so this year were the topic not so extended as it is. How may one hope to explain adequately within a period of 25 minutes the events of 25 years—25 years which will be the subject of discussion it may be for well-nigh 25 centuries. With these introductory remarks, with the request that you stop your watches although I shall look upon mine, I begin without further ado.

THE PROGRESS OF INTERNATIONAL LAW DURING THE LAST TWENTY-FIVE YEARS

BY JAMES BROWN SCOTT

President of the Society

1. THE WORLD TURNED UPSIDE DOWN

On the eve of the celebration of the one hundred and fiftieth anniversary of the capitulation of Yorktown, it is not unfitting to remark that on that occasion the soldiers of the British Army laid down their arms to the tune of "The World Turned Upside Down." Doubtless it seemed to them turned upside down as far as the colonies were concerned, but it has since been turned upside down everywhere in the same way,—no longer governed from above, with local government handed down to an expectant multitude, but the multitude, in the consciousness of their rights, creating the form of government which to them seems meet and proper. It is indeed a world turned upside down.

The great principle in nature is to find an equilibrium, and, finding it, to preserve it. The monarchy is from above and the monarch very much like one sitting uneasily upon a throne perched upon the apex of a pyramid, subject to the elements and constantly in danger of losing his ground, as far as his seat of empire is concerned, whereas the foundation of government in the conception of things which has come into being is as broad as the base of the pyramid. It can not turn over. It can not be turned upside down, because it is on mother earth. It cannot fall. Upon this foundation we are building the temple of justice and of peace.

2. THE PEOPLE, CONSENT OF THE GOVERNED, SELF-DETERMINATION

There are some observations of a preliminary or introductory nature which should properly be made before passing to the topic of the evening. They are fundamental. They have made their way slowly. In many parts of the world they have come, as we hope and believe, to stay.

The first of these observations is to the effect that the source of power in the first days of the American experiment was lodged not in all but in some people. This conception came to the front in the opening days of the American Revolution and is the subject-matter of the first law of the United States of America, issued in the form of the Declaration of Independence of the 4th day of July of the epoch-making year 1776.

It is not an original idea that government depended upon the consent of the governed, but the Declaration is unique in that it marks the first occasion on which the doctrine of popular sovereignty became the practice of the state as distinct from the theory of enlightened publicists.

The second factor, a necessary consequence, indeed, of the statement in the Declaration that all men are created equal, has resulted in the source of power being lodged in all the people. This conception was really implicit in the Declaration; indeed Chief Justice Taney, in his opinion in the *Dred Scott* case, stated that the terms were so large that, if the language were of today and were to be interpreted in his time, it would be held to include all the members of the human family.

We have passed from the first to the second stage and have taken all but the final step required to recognize in all the people the legitimate source of power. In the original conception, the power was admitted to reside in all men, who were considered as such in the restricted sense of the day. The first step extended the conception as the result of the Civil War, running over a period of four years and sounding the depths of the question, "to all men." This was by an amendment to the Constitution. The second step, also an amendment to the Constitution, extended suffrage to all human beings. The third step will have been taken and the development completed when all civil as well as political rights are admitted to inhere in all human beings, without discrimination of race, of religion, of language or of sex. One foot indeed has been pushed forward and we are a-tiptoe for the laggard foot to advance to the support of its fellow, already firmly planted on mother earth.

The result is a transformation of the conception of the state from that of territory to that of all people in whom, actually or implicitly, the power of the community rests. This is, as it were, the base of the pyramid of which I have spoken. It is a foundation co-terminous with the territorial lines within which the inhabitants exercise their sovereign jurisdiction. It is important not as a matter of theory but as a fact which must be borne in mind. No person can now exercise, singly and individually, the powers of the state. This is a matter of constitutional law, but it affects the relations between the

states, for just as the rights of parties in litigation depend in large measure upon procedure, so the intercourse of states depends in large measure upon internal organization. In our country we know that, while the President may negotiate treaties, which, when approved, will bind the government in all its branches as well as the good people of these United States, nevertheless the framers of the Constitution were unwilling to vest such vast power, fraught with such consequences, in a single person, however exalted his station and possessing to whatever degree their confidence. The Senate, as the representative of the states in their united capacities, was associated in a two-fold manner with the treaty-making power as a check upon its exercise by the President: the advice of the Senate to be had in advance; and subsequently the consent of the Senate to the ratification of the treaty, if approved by two-thirds of the senators present. Upon which ratification, and signature by the President, there follow as a matter of course the exchange of ratifications and the publication of the treaty in its perfected form as the law of the land, binding the United States in all their departments and the people in all their relations, in so far as they may depend upon a treaty.

The power, however, to advise and to consent involves the power to reject or to amend, a failure to understand which has caused no little confusion and concern in international circles.

Such is the connection between the action of the government in matters international and the way in which the action is controlled by internal branches of the government. Therefore it is of the highest moment that we understand the source of power as vested in the people, to be exercised on appropriate occasions through the organs of their choice; because in the new state of things government derives its just powers from the consent of the governed, a doctrine which has crossed the Atlantic in the course of one hundred and fifty years and has been the cause of commotion and revolution, where it has not developed by the slow and gradual process of evolution. This is reinforced by another doctrine which is implicit, although it may be looked upon as a corollary: that the groups of people which we call states are not to be passed as chattels from one sovereign to another sovereign, in the old sense of the word, but their relationships as parts of a community or as individual groups in the form of new states arise as a result of their self-determination, a doctrine which crossed the seas with the American Expeditionary Forces in the World War, and which was put into effect by none other than a President of the United States who refused to consider the question of peace with any of the belligerents whose government did not depend upon the consent of the governed, or to recognize any change in the status of peoples, whether by joining a community in existence or setting up for themselves, unless it were based upon the consent of the peoples involved.

Today we find ourselves confronted by these situations, a correct understanding of which is necessary to an understanding of the change in inter-

national law and in international relations which has taken place in the past twenty-five years, for the change which must be evident to the casual observer is that the law of nations is becoming human; that it is the law of the individual in his daily life, which is becoming the law for states in their intercourse; and, as a consequence, the law must be known in order to bind and to be observed, which means that it is being made no longer behind closed doors and that the treaty, which is a law, derives its validity from the internal law-making power and upon its being proclaimed as a statute and the law of the land.

Of a truth, this old world of ours has turned upside down.

When the distinguished Chief Justice of the United States learned that the progress of international law of the past twenty-five years was to figure in the program, I felt, as I read his letter accepting the invitation to the banquet, that his hands were in the air, although he held the pen in one of them, expressing a sense of horror at the topic. The difference is that he was a free agent, whereas I, at the beck and call of the Program Committee, am not. They have decreed that the progress of international law in the last quarter of a century should be the theme of the opening address. It is; but, as they do not prescribe the terms, I am to that extent the "master of my soul," and instead of a chronology or a narrative, I shall invite your attention to a series of observations upon some of the movements which have taken and are taking visible form under our very eyes, although we see, as it were, "through a glass darkly."

I shall therefore speak of some of these matters, arranging them under numbered headings, in the hope that in your minds at least, they may in the nature of a mosaic assume an artistic design which they do not receive at my hand.

3. THE ONENESS OF THE WORLD

The most obvious of all the tendencies, and well-nigh a realization, is the oneness of the world. Traditions, separation by mountains, by streams, not to speak of vast oceans, have done their best to separate the human family, a term appropriate in a large sense as indicating a line of demarcation between the four-footed world and those living in the world and often themselves over-worldly, but who nevertheless look onward and upward, with the eternal stars above them, with a hope and an inspiration in the heart of better things.

However, this is a man's world and there may be more to be said for the fable than we would like to admit, of a painting of a contest between a lion and a human being, the latter having the better of the contest, evoking in a passing lion the thought that the artist was a man, not a lion; otherwise the design would have been different, as also the ending. But the conception undoubtedly exists of the oneness of the human race, and it is so near to a realization that it is to be reckoned with.

Occasionally this has found form in official documents, such as the pre-

amble to the Pacific Settlement Convention of the first of the Hague Peace Conferences in 1899, to which the representatives of twenty-six states were parties, and the second of the series in 1907, in which no less than forty-four nations of the world confessed their faith. This was indeed an outer manifestation, and a very important one, the second being within the period of twenty-five years to which I must devote myself.

The high-minded and generous soul, standing upon the mountain top, has caught the earlier beams of the on-coming day. To the Stoics the world was as a vast mansion housing the members of the human family; and, enlightened by the opening up of the New World, with hitherto undiscovered peoples, the Spanish theologians conceived, in classic terms, of states made up of individuals, with governments of their own but changeable at will, and forming by mere association a family of nations. This larger family, of which the states are the members, exists of itself by their association, possessing, in the opinion of the most distinguished of their publicists, writing some forty years after the discovery of the New World, the inherent right of protecting itself, of issuing edicts, of securing their enforcement and of punishing violations of the laws of nations, such as the failure to observe the immunities of ambassadors. Little by little the germ, like the grain of mustard seed, has grown until the nations of the world can rest themselves under its ample branches, and we find ourselves living under the Covenant of the League of Nations.

It is difficult to assess the value of the Covenant without discussing details, and the time, as it were but a moment, at our disposal does not allow an appraisal. However, great things are usually matters of principle and we are, so to speak, surveying the forest from afar, without losing ourselves in the woods.

The Covenant means one thing, and that the greatest thing in the world: that no calamity can happen to one country without affecting in a greater or less degree each and every other country. We, with our untold wealth, have nevertheless the problem of unemployment because of the suffering of a distressed Europe. No violation of international law in any part of the world is a matter of indifference to any and all other nations, because if one state has the right to violate a principle of the law of nations, every other state has the same right, with a resultant anarchy. The resort of one nation to force, in order to cause its contention to prevail in a dispute with another country, may result in war, and war affects every other nation in the world which would wish to preserve, in times of war, the rights of peace. Unwillingly, without an opportunity of being consulted, it finds itself affected by the war, without being a party to its prevention.

There is such a thing as a common law of nations: a law common to all, applicable to all, with an equal interpretation to all, for

All are but parts of one stupendous whole,
Whose body Nature is, and God, the soul.

What was implicit in the coexistence of two nations has become explicit in an association of nations, and the Covenant of the League of Nations is in a very real sense the outward and visible sign of an inward and spiritual oneness.

The tendency has been to confer regarding common interests. Conference has now become a duty, and a failure to confer is a violation of a duty which affects the community of nations. We are hereafter to be brought together, and the hope of the future is that we can only separate as friends.

4. THE TREATY-MAKING POWER

It was the custom in times past for a nation to consider its rights and its duties with reference to its own interests and to make whatever treaty it could with its neighbor. The treaty created an obligation which was as a law to each of the countries. What one did, the many have done, and indeed all could do; but, as the treaty merely bound the contracting parties, there would needs be a multitude of treaties if there were to be but one law, and grave doubt indeed that, if a universal obligation were created, its interpretation would be equally universal and uniform.

To obviate a multitude of treaties, we have hit upon a multitude of contracting parties, to a single text, with a single interpretation. There was trouble indeed under the bilateral treaty, as each party might interpret it in his own way and at least there might be jarring and conflicting views. In the case of a multilateral treaty, we are confronted with the possibility of as many interpretations as there are contracting parties, yet, meeting in conference and adopting a general principle, the language used should be susceptible of but a single interpretation. It should not be the interpretation of the one or the many but of all; in other words, an international agreement, creating an international obligation, should have an international interpretation by an organ of the contracting parties.

We of the United States have had some experience in these matters, and, profiting by experience, we have been forced to measures which are susceptible of an international application. Thirteen of the English-speaking colonies in North America declared their independence of the mother country. They formed themselves into a loose league under the Articles of Confederation, each state expressly reserving such powers as it did not expressly grant to the United States in Congress assembled. The treaty-making power was declared by the sixth of the articles to be solely and exclusively vested in the Congress, barring an exception, which it is not necessary to discuss for the present purpose.

Now the union, under the Articles of Confederation, which was declared to be "perpetual," was, after a little experience, shown to be imperfect. It had no permanent court of justice, with the result that each of the treaties which the United States had made with foreign countries, during the period of the Confederation, was susceptible of as many as thirteen different, jar-

ring, not to say clashing, interpretations, if the wit and ingenuity of the judges of the several states were equal to the occasion.

The difficulty arose in a concrete and irritating form in the interpretation of the treaty of September 3, 1783, with Great Britain, which treaty recognized the independence of the United States. As there was no supreme tribunal of the United States, it seemed naturally to follow that each state should interpret for itself the nature and extent of an obligation which the treaty was meant to impose on each of the thirteen. The case was different with Great Britain, a single, unitary contracting party. The mother country was somewhat put out with the erring offspring, and the interpretation on the other side of the Atlantic did not correspond to the standard of duty which the erstwhile colonies placed upon the treaty, to which, no longer colonies but states, they were contracting parties.

The result was a unanimous resolution of the United States in Congress assembled, that the treaty-making power was solely and exclusively vested in the United States in Congress assembled, that the states had no right either to carry its provisions into effect or to prevent their execution by statute, or indeed to interpret the obligation in its courts of justice contrary to the interpretation placed upon it by the United States in Congress assembled. Hence there followed a stipulation in the Constitution of the United States to the effect that "all treaties made, or which shall be made under the authority of the United States, are the supreme law of the land," and providing for the creation of a court of the states, in which a federal obligation, for such is a treaty, should be passed upon by a federal agency, the Supreme Court of the United States, created for that purpose, among others which are not material to the present occasion. The result is that a federal obligation, created by the Federal Government, is interpreted by a federal agency.

Is there any reason to distinguish international law, which is a common law of nations, from an obligation binding upon the states as members of the Federal Union? Can a contracting party to a multilateral treaty interpret it for itself? If it can, each of the contracting parties may do so, and, while it may be admitted that in a multitude of counsellors there is wisdom, it must be confessed, as the result of a bitter experience, that in a multitude of interpretations there is anarchy. An international treaty imposes an international obligation, and it can or should only be interpreted by an international agency.

A multilateral treaty, as distinct from a bilateral treaty, has made apparent as never before the need of an international interpretation of international obligations. Of this type of treaty we had, both in form and in fact, a perfect example in the many conventions of the second of the Peace Conferences meeting at The Hague in 1907, which had rendered sufficiently obvious the advisability of an interpretation by an international tribunal of a permanent character, to such an extent, indeed, that the conference agreed upon an International Court of Prize, for the decision of cases arising out of

war, and upon a plan for a Permanent Court of Arbitral Justice, to be established when the contracting parties had agreed upon the method of appointing the judges.

The establishment of the League of Nations, with its frank and definite assertion of the oneness of the nations, all to be affected by an act of one, resulted in the creation of a Permanent Court of International Justice whose judges were to be elected separately but concurrently by the Assembly of the League, representing all members upon a plane of equality, and by the Council, in which the larger states have a preponderance of power, so that each should be a check upon the other, the check of an abuse of power by one or the other of these bodies.

The idea, and indeed the feasibility, of a Permanent Court of International Justice were American; its constitution was rendered possible by the Covenant of the League of Nations; and it is perhaps not too much to say that the American example could not have been followed and a court of international justice established at The Hague or elsewhere, had it not been for the Covenant of the League, and, I should add, the presence of our elder statesman, Mr. Root, at the committee of the League of Nations appointed to prepare a plan for an international court, who justified the ways of the United States to men, proposing election by each of the two League bodies as a check upon the other, in accordance with American practice in legislation, and secured the establishment of this international agency for the interpretation of treaties as well as of the rights and duties of the nations under international law.

The multilateral treaty is a recognition of a unity of interest on the part of the international community. The Permanent Court of International Justice is a recognition of the unity of the international community and of the necessity of a single and universal interpretation of each and every obligation arising under a treaty and the common law of nations.

5. THE CODIFICATION OF INTERNATIONAL LAW

But what is an international obligation and what is the law of nations to which reference has been made? An obligation, in the sense of international law, is a right, coupled with a duty created by agreement rather than imposed, inasmuch as agreement is the way in which equals create and define duties, for a command would be unthinkable where there neither is nor can be a superior.

But how is the obligation to be discovered, its nature and extent defined? What are the provisions of the common law of nations, whether they are the result of natural rights of individuals, or are considered as duties of the states composing the international community, or as rights and duties created under multilateral, or indeed bilateral, treaties? A legislature can include in a statute the usage or customs of a particular subject, and in a series of statutes cover the law. No nation can do this with a law common

to nations, for, if it attempts to do so, it is in effect imposing its legislation upon each and every foreign country, its conception of right, its conception of wrong, and its interpretation of one or the other. If each of the fifty or sixty nations should put in the form of a code its conception of international rights, international duties and their interpretation, we would merely have fifty or sixty codes instead of one. We would not have a single law, with a single content and with a single interpretation. Even supposing, which could only be done by a stretch of the imagination, that the content as well as the form should be identical: each being the code of each and not a law of the other, the code might be altered in content, in form and in interpretation, at the whim or pleasure of the fifty or sixty nations.

We end as we started, in a wilderness of divergence and a conflict of right and duty and interpretation. The common law of nations requires a common code, and a common code is the result of conference, discussion, agreement upon the content, as well as the form of each of its articles, with an agency for their interpretation and application which, fortunately for us, exists at The Hague.

But what of the law which the court is to apply? If it be admitted that there is a common law of nations, what are the provisions which are common? We have the court, but it can only be said in general that we have the law. A tendency no larger than a man's hand in the sky above us a few years ago is now the order of the day: the statement of the law of nations in the form of a code. This means, of course, conference, discussion, agreement. It can not be done at once; it may perhaps only be done gradually; but to the extent that it is done, and only to the extent, there is a court with a law at hand to determine the rights and the duties of the august litigants.

Unconsciously, without a thought of its ultimate importance, the parties to the Crimean War met in Paris and adopted some four slight articles. This was, however, a demonstration of the possibility of codification in its entirety; for, if nations could agree upon one point, it showed the possibility of agreeing upon any and all points.

In the Civil War of the United States, the most perfect specimen of codification of a difficult branch of law was furnished by the wit and ingenuity and fine understanding of Francis Lieber, Prussian by birth, American by adoption, whose code was promulgated by the Government of the United States for instructions to the armies in the field. This differed from the Declaration of Paris, the official act of a number of countries, in that it was a codification of the laws and the usages of war by a single belligerent.

In 1873 the Institute of International Law was founded at Ghent, and from that day to the present it has been adopting at its regular meetings a series of resolutions, covering the most important phases of the law of nations, in the form of articles. That is a private organization. Dr. Lieber's achievement shows the possibility of an official codification of a single subject. The Declaration of Paris has shown the possibility of an official codification

of important questions by a number of governments. The experience of the Institute of International Law shows how, through the course of years, unofficial gatherings of enlightened publicists may consider phase after phase and endow the world with acceptable specimens of codification.

To speak of what has happened within the past twenty-five years: In 1907, at the royal residence of The Hague, in the Hall of Knights, the representatives of forty-four nations agreed upon a series of conventions, without apparently a thought that they were demonstrating the propriety, and indeed the necessity, of a codification of the rules of international conduct. In the revision of three conventions of the first of the conferences in 1899 and the addition of ten conventions they gave the form of a code, in large measure, to the common law of nations.

The movement, begun unconsciously, but none the less successfully, was continued in 1930, when the first of the so-called conferences for the codification of international law met at The Hague in the months of March and April, which is destined to have, it is to be hoped, an unending series of successors until the law of nations is in fact, as well as in theory, a law of all the nations, because framed by their accredited representatives and agreed to by each of the nations of the international community, in accordance with their law-making organs.

Codification is now the order of the day.

6. THE PROGRESS OF PEACE

A tendency which has manifested itself in positive acts is toward peace. The fact needs no argument that the world needs peace, and apparently the world wants peace. It is enough to mention, without entering into details, the Pacific Settlement Convention of 1899, a convention whose every provision breathes peace and good-will; and, meeting in an atmosphere of peace, the conference justified its gathering by the most peaceable of conventions, I am inclined to think, which has ever been adopted in this war-ridden world.

In its opening article, the signatory Powers agree to use their best efforts to insure the pacific settlement of international differences. The convention then defined and codified good offices and mediation, declaring both to be friendly and to be taken as such; it established the machinery and the procedure of international inquiry by which questions of fact were to be submitted to a specially formed commission to find the facts involved, which, while reporting to the parties, should leave them free to give such effect to the report as they believed it justly merited.

Arbitration was defined, and a Permanent Court of Arbitration was provided for, as well as the procedure to be followed, together with an article (27), in which a duty of vast possibilities was set forth in a single sentence: "The signatory Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them." A small matter, you may say, but the

least pressure in matters international seems to be productive of the greatest results. Liberty of action is not unknown in domestic relations, but between nations it is fundamental, and a mere suggestion, leaving the nations to accept it or not, is in practice a greater force than a command.

The duty would not seem to be great. The purpose of the article is only to remind the nations, in case of a serious dispute, that the Permanent Court of Arbitration is at their disposal; yet the acceptance of this duty was the cause of hesitation on the part of some of the smaller Powers, which feared, apparently, that the larger Powers would be unmindful of the duty, while imposing it upon the weaker ones. It was on that occasion that M. Léon Bourgeois, Chairman of the Delegation of France, overcame opposition by an address which in itself marks an epoch in the history of peaceable settlement:

Gentlemen, what is now the rule among individual men [he truly said] will hereafter obtain among nations. Such international institutions as this will be the protection of the weak against the powerful. In the conflicts of brute force, where fighters of flesh and with steel are in line, we may speak of great Powers and small, of weak and of mighty. When swords are thrown in the balance, one side may easily outweigh the other. But in the weighing of rights and ideas disparity ceases, and the rights of the smallest and the weakest Powers count as much in the scales as those of the mightiest.

This conviction has guided our work [he continued] and throughout its pursuit our constant thought has been for the weak. May they at least understand our idea, and justify our hopes, by joining in the effort to bring the future of Humanity under the majesty of the Law.

This is, I veritably believe, the starting point of our modern international development.

The second step in bringing the future of humanity under the majesty of the law was taken by an American Secretary of State.

Among the delegates to the Second Hague Peace Conference, some of the more advanced, it would be discourteous to say enlightened, sought to interpose between an ultimatum and a declaration of war an interlude for a questioning of the spirit and for reflection. Forty-eight hours were proposed and rejected; twenty-four hours with like effect. Nothing was done because nothing could be done.

But Mr. Bryan did what was declared to be impossible. He negotiated in his short tenure of office a series of some thirty treaties for the advancement of peace, differing somewhat in language but uniform in obligation, by which the parties bound themselves to submit their disputes to a commission of inquiry, consisting of five persons, with a year, unless extended, at their disposition to examine and report to the parties on the facts in dispute, the parties agreeing not to commit any hostile act, much less resort to war, during the interval. This tipped the scales in favor of peace. The difficulty is that nations rush into war. We have recently had a terrible and

chastening example. An agreement not to commit a hostile act or to resort to war for the period of a year, during which time the facts in dispute might be fully discussed, would reduce the entire problem to a mere question of time. If the nations could agree upon one year, might they not for a decade, for a generation, perhaps forever? Here the renunciation of war as a means of national policy, with which the names of M. Briand and Secretary Kellogg are so honorably connected, lay in embryo and the pledge of peaceful settlement was implicit.

Secretary of State Bryan was perhaps unconscious, when he took his first step, what the consequences of his treaty would be. He felt and he said that a quarrel would indeed be a serious one which would lie, as it were, fallow a year. This is the second step, and the third, already mentioned, is the Covenant of the League of Nations, by which the members pledged themselves to peace and to action against its disturber within their midst.

The treaties of Locarno of 1925 are intended to supply the force to maintain peace, should it be threatened on the part of certain members of the League; and the Pact of Paris to bind all nations, including those which are still beyond the League, to a renunciation of a resort to war and to the settlement of their disputes, of whatsoever kind, by peaceful means.

It is a just source of pride that the advocate of the treaties for the advancement of peace, Mr. Bryan, that the champion of the Covenant of the League of Nations, President Wilson, and Secretary Kellogg, who gave a multilateral form to M. Briand's formula, were Americans, and of special pride to us that they were all members of the American Society of International Law.

If the nations which are members of the society of nations should live up to their peaceful pledges, if the parties to the Locarno treaties should observe them, and if the nations, which are not members of the League but have joined with members of the League in the Pact of Paris, submit all their disputes to peaceful settlement, war would have a hard time of it; but experience whispers a warning word and it may be we or our immediate successors who will be brought face to face with war.

I read a remark the other day, attributed to Mr. Newton D. Baker, Secretary of War in Mr. Wilson's administration, likewise a member of the American Society of International Law, to the effect that no single generation should be called upon to undo the work of many generations; that some changes are best made gradually; and that we may well believe in what ought to be and use that—I now quote his exact words—"as a sort of lighthouse to steer by." That seems to be sound doctrine. There are many pitfalls in our everyday life and there may be steps forward and backward in our international advance; but the mere fact that there may be a backward step should not deter us from pressing forward. It should rather be an incentive.

The renunciation of war is a larger and different factor than the layman would think. It is not merely the rejection of force in the settlement of

international disputes, but it profoundly affects the nature of international law as a branch of jurisprudence. Matters have progressed within the state to such a degree, because of the existence of courts of justice, that an individual may only invoke what is called "self-defense" for the instant protection of life or property, the municipal conception being that he is not obliged to stand with folded hands when one or the other is affected. Injuries already committed or other injuries in process of commission may be referred to the Court of the Prince, as it was once called, and their appropriate remedy secured: the damage compensated for, if it be of a civil nature, and the injury punished, if a criminal offense.

The interpretation placed upon the renunciation of war contained in the Pact of Paris is to the effect that it leaves untouched the right of self-defense, thereby placing the two laws, municipal and international, upon a footing of equality, if only the court be at hand. The municipal court exists, and has for centuries. The international court is a creation of our day but firmly established at The Hague. The similarity between the two branches of the law was apparent. Being apparent to the enlightened for centuries, why then the absence of the court between nations? Because the Court of the Prince was looked upon as that of a superior and nations being considered equal, the court could not be imposed upon any of them. Until the American example, it did not apparently enter into the mind of the enlightened, much less into the backward practice of nations, that the court which they desired could be created by agreement, compact, contract, treaty,—the name is immaterial. This precedent is one of the crowning glories of these United States of America, which, in their first attempt, created temporary tribunals or courts for the settlement of the disputes of the erstwhile colonies of Great Britain, then thirteen states under international law, only to replace temporary tribunals after a decade by a permanent court of the states, with the jurisdiction of the temporary tribunals.

Never, it would seem, has a legal maxim had a more fortunate career and a wider application: "When the reason of the law ceases, so does the law itself." *Cessante ratione legis, cessat ipsa lex.*

7. MIRACLES OF A NEW WORLD

It would be considered short of the truth to say that we are living in a new world, because the world is as it has been for some time; at least geologists would have us believe so. It would perhaps be subject to criticism on the part of some should we say that we are living in a different atmosphere, or that the man and woman on the morrow of an international event such as the World War or the treaty for the renunciation of war are different. They are not. They are the same. That is, to be sure, one of the difficulties, because we must convince against their will the majority of people instead of skipping a generation and dealing with young and open-minded people. Yet I am bold enough to say in my individual capacity, without committing

the members of the Society of International Law to the thesis, that we are living in a new world, in a new atmosphere, a world as different from the world of yesterday as the world of a thousand years ago, and an atmosphere as different from the atmosphere of yesterday as peace is different from war; and in support of this exaggeration, as it will doubtless appear to the many, I invoke some texts which are indubitable facts, facts inconsistent with any other interpretation than that we are living in a different minded world from that of a decade ago, which is an immeasurable period of time, if we are to believe that a thousand years are but a day with the Lord.

To me at least, the strains of "The World Turned Upside Down" of my lord Cornwallis are ringing in my ears. The armistice of the 11th of November, 1918, changed the old state of affairs in the Old World, just as the capitulation of his lordship's army at Yorktown changed the state of affairs, in the British conception, in the New World.

Let me read you, without comment, the evidence on which I rely. We have it on the very best of authority that truth is established in the mouth of two witnesses. For good measure, we shall have three examples: two to prove the fact, and, as we used to say in our younger days, one to grow on. The first is the first article of the first Constitution by the German people: "The German State is a republic. All political power derives from the people." The second is the first article of the first Constitution made by the Austrian people: "Austria is a democratic republic. The law derives from the people." The third? There is such an embarrassment of riches in the Old World that it seems almost an impossibility to choose one, instead of invoking examples which come, as it were, in legion to overwhelm us and give the "doubting Thomases" pause. Which shall it be? Czechoslovakia. Why? Because another Declaration of Independence to which it was a party on October 26, 1918, was declared in Independence Hall in the City of Philadelphia, in the very building where the independence of these United States was declared, thus marking indissolubly and for all time the cause and the effect, in one short phrase of six words in its later and formal Constitution: "All power derives from the people."

Do I need to continue? Is it possible to say that a world in which such things happen is the same world? Are we not justified in thinking that at last mankind is learning by its own experience, the hardest but still the safest, the surest of teachers and of taskmasters? To me these things are as miracles. I seem to understand what Tertullian meant when he said: "*Credo quia impossibile est.*"—"I believe it because it is impossible"; and with the past which we have had and the present which now exists, there seems to be no limit to possibility but the lack of that faith which would remove mountains.

Who is there among us of mature age who would not have turned aside some years ago, in the youthful days of those whom I have now the honor of addressing, from one who should have prattled of government by the consent

of the governed, self-determination, a Covenant of the League of Nations, a Pact of Paris, with the signatures of fifty-seven states, in which their representatives would, under instructions renounce war as an instrument of national policy and pledge the civilized countries of the world, all of the countries of the world accepting that dream which we call the League of Nations, to adjust all of their disputes without the exception of any one, by peaceful settlement. The dragon's teeth have not this time brought forth armed soldiers, but fruits of peace, a rich and a universal harvest which we have garnered, and which our civilization requires and permits that we protect.

8. THE BRITISH COMMONWEALTH OF NATIONS

Not the least important international event during the past twenty-five years is the transformation of the British self-governing colonies into the British Commonwealth of Nations, the nations composing the Commonwealth being Great Britain and Northern Ireland, the Dominion of Canada, Australia, the Union of South Africa, New Zealand, Newfoundland, the Irish Free State, with India in the distance: the nations in alliance, possessed of equal rights, with a power to stay or to go as they please; the bond of union slender and yet perhaps the strongest because not made by human hands, a common language, common traditions, the ideals and civilization common to the members of the Commonwealth. It is not a conscious creation. It is a thing of growth, a growth within the appointed twenty-five years.

The first intimation of a separate existence, the first indication of the change, in being or impending, seems to be set forth in the arbitration convention of April 4, 1908, between Great Britain and the United States, negotiated by Secretary Root and Ambassador Bryce, both of the American Society of International Law, that such "special agreements" to submit the disputes to arbitration "on the part of the United States will be made by the President of the United States, by and with the advice and consent of the Senate thereof; His Majesty's Government reserving the right before concluding an agreement in any matter affecting the interests of a self-governing Dominion of the British Empire, to obtain the concurrence therein of the Government of that Dominion."

This was a momentous disposition, a recognition in an international treaty of a more than colonial status. The dominions stood side by side with the mother nation in the trying days and years of the World War. They sat at the council table at Versailles and they affixed their signatures to the treaty of that name, accepting the rights and acknowledging the duties created by that document. They are, with the exception of Newfoundland, contracting parties to the Covenant of the League of Nations, upon a footing of equality, with Great Britain and all the other participants; entitled to take equal membership in the Assembly of the League, in which they are actually represented, and likewise entitled, upon a plane of equality, to membership in the Council of the League, to which the oldest of the dominions (Canada)

has been elected; signatories of the protocol of the statute of the Permanent Court of International Justice and eligible to election as judges of that greatest of international instrumentalities.

What is the connection between all the members constituting the British Commonwealth of Nations? It is not direct. Each is independent of the other. The legislation and the laws of each apply to each without affecting or binding the others. Indirectly they are connected through the Crown, His Majesty, George the Fifth, being in effect King of Great Britain and of each of the allied nations, dealing himself directly with his ministry in London and appointing the Governors General to each of the other members to perform his royal functions as his representative to the British nation to which each is accredited. The relationship is through the person of a common sovereign and is therefore a personal relationship, such as that which existed in the good old days of His Majesty, George the Third, King of Hanover, on the one hand, and King of Great Britain, on the other, who, considering the world "turned upside down" by the capitulation of Yorktown would have considered the change in the relationships between the mother country and the outposts of the commonwealth as a devolution unfortunate in his opinion,—and with a pronounced accent on the first syllable.

Nations which send and accept ministers plenipotentiary, such as the members of the British Commonwealth of Nations, can not be denied equal rights and the duties and the privileges, under international law; and, if that law does not seem to include them, the law is to be changed rather than the status of the members of the British Commonwealth, in alliance with one another. Their geographical separation, the recognition of this separation, in fact as well as in theory, their position as outposts of the widely scattered English-speaking peoples, will mean much, how much we dare not try to express today; but neither the least nor the most remote consequences will be in all probability the prevalence of English as the commercial language of the world, not to speak of the destiny which may be reserved to the "tongue that Shakespeare spake", this 23d day of April, 1931, being the three hundred and sixty-seventh anniversary of the birth of him whom posterity acclaims as the poet of the English-speaking peoples.

9. BRIAND'S VISION OF A UNITED EUROPE

On Sunday, May 18th, of the year that is past—the anniversary of the calling of the first of the Hague Conferences—the reading public was taken by surprise, as it were, by a proposal on the part of a European statesman of a *rapprochement* of the nations of Europe, so close indeed as to suggest a European Commonwealth of Nations. The advocate of the plan was none other than M. Briand, Minister of Foreign Affairs of the sister Republic of France.

For many years past I have dreamed of a United States of Europe. I made some observations on the subject last year which have found a

refuge in the *American Journal of International Law*. As I am still dreaming of a coöperation of the European States of a permanent nature and as I still agree with the observations on the subject which I then made, I am indulging in the rare pleasure of quoting myself, as it were, without attempting to state in different form the ideas which, however expressed, will be those of the *Journal*. They are perhaps not inappropriate, inasmuch as they were addressed to a group of European journalists.

We of the Western World have had some experience in matters of federation and, as the American experiment is the only one which has hitherto survived its makers, it will perhaps not be considered impertinent if I should venture to suggest that America should not be overlooked in contemplating a *rapprochement*, however loose, of the nations of Europe. Of course, it would be preposterous to propose the acceptance of an American plan, however thoroughly it might have justified itself in this part of the world, because a country is not, and can not be, a free agent; it is conditioned by its traditions, from which it is difficult, if not impossible, to separate itself. Its past is in its present and the future must take note of each.

The Americans had had many and great difficulties to overcome; their past so infinitesimal, their traditions so recent as to be of their own making, that with good will they were able to form what they ventured to call "a more perfect union", which we of today would be inclined to speak of in the superlative. I would only venture to say that the American experiment has proved that states regarding themselves as free, independent and sovereign may live together and in union and under some form of a superintending head or government.

This is a fact which dare not be overlooked, for what one group of states has done, another may do, even though it be in a lesser and in a different degree. The past and the exigencies of the present must determine the form. What these exigencies are, I may not consider. It is sufficient if I add that the form of government which the more perfect union was to replace had proved inadequate. It was a diplomatic association, rather than a union of states; and under these circumstances, it seemed to be impossible for the statesmen of that day to better the economic breakdown from which the states were suffering. The Declaration of Independence was of July 4, 1776, and it was exactly eleven years later that the delegates of the American States met in conference in Philadelphia to consider what could be done. It is eleven years since the World War, and the statesmen of Europe find themselves face to face with economic conditions which to them seem insupportable, if they do not indeed spell a breakdown, as was the case with us. It is, if I may venture to say so, well for the countries of Europe that their leading statesmen should likewise confer.

The American States had suffered from paper currency. They had not wholly recovered from the effects of a long and protracted war, almost double that of Europe in length, and under circumstances not less disastrous. Each

state determined what commodities should enter and what should leave its frontiers, and the tariff to be imposed in either case. The result was that commerce was at a standstill, and that the sources of economic life were drying up. A merchant found commodities on hand a debit rather than an asset.

A few delegates had met at Annapolis the year before, ten years after the Declaration of Independence, to consider what could be done for commerce between the states; but the problems loomed so large that they felt that nothing could be done without a conference of the states; accordingly a conference was held the ensuing year in Philadelphia, in which twelve of the states were represented by their official spokesmen. Last year, ten years after the World War, the statesmen of Europe discussed, as I understand, in Geneva, the possibilities of ameliorating the economic situation through a *rapprochement* of their various countries.

The cause of the American gathering of the states was, as I have said, and which I feel that I should repeat, commercial or economic; indeed the chairman, as we would say today, of the Massachusetts delegation, remarked on the floor of the Federal Convention that Massachusetts was able to defend itself and therefore did not need the protection of the other states; and that its whole reason for federation was the commercial situation.

What can be done, or what the men of light and leading in Europe should do is for them and the peoples whom they represent to determine. It will not perhaps be considered immodest on our part to say that our revolutionary fathers thought themselves to be in the same condition and that they found a way out through a union, which has proved satisfactory to their descendants.

There are four things which they did, and which, taken together, made a success of the experiment, for it was an experiment, Madison himself, whom a grateful posterity calls "the Father of the Constitution," saying that it was the first time that the representatives of states had met together to deliberate on the form of government to be established in accordance with their views and their needs. He went on to say, as I recall it, that the labors of their hands would be received with astonishment and admiration, were they able peaceably and freely and satisfactorily,—I am quoting literally,—“to establish one general government, when there is such a diversity of opinions and interests,” when not cemented or stimulated by any common danger.

The first of the four things, whose conjunction has produced both astonishment and admiration, is that the peoples of the states reserved to themselves the powers of sovereignty which they did not grant to a general government of their choice and creation. To such an extent is this true that, if the Constitution of the United States should be repealed over night, the forty-eight states of the American Union would appear before an astonished world as so many free, independent and sovereign states, with all the trappings and agencies of government.

The second of the four things is a plan of reaching the peoples of the state to the extent of the powers granted to the Federal Government, without the intervention or compulsion of a state. The state did not need to act, as the law of the Federal Government was to bind all inhabitants of each of the states, and the federal obligations were to be interpreted and applied through the federal courts to be created for this purpose. There is thus a local law of the state for purposes beginning and ending within the state; there is a federal law for purposes beginning, it may be, and ending within the state and yet affecting foreign nations; and the nature and extent and application of these laws are determined by courts of the Federal Government. There is here no force, no pressure, no compulsion upon the state; the individual obeys the Federal Government just as he had learned to obey the state government; there was to be a double allegiance, general to the state and special to the extent of the granted powers to the states in their united capacities.

The third of the four things is that the framers of the union refused to have the capital located in any one of the states for fear that it would be dominated by the state in which it was situated. This seems simple today, but to them it was new and therefore difficult. It was a union of states, for the proclamation of independence found the colonies and the states without a foot of American soil which was not either held or claimed by one of the colonies and later by the states.

The Continental Congress, a body of diplomatic representatives, met in various capitals and towns, as the military situation permitted or required, and, as the Government of the United States was not to be possessed of territory in its own right but to hold unsettled territory in trust for new states as the territory should be settled, it taxed the statesmanship of their leaders to locate the government somewhere in property possessed by the government and over which it should exercise undivided authority. They hit upon a plan of authorizing the Congress of the Union to accept a strip of territory, not exceeding ten miles square, from one or more states which should be willing to grant it for that purpose. This is the District of Columbia, in which the Government of the United States rules, as does the Pope in the still smaller State of the Vatican, in order to reach something more than one hundred millions in the one case and hundreds of millions in the other.

The last of the four things is that the states intended to and actually did organize the states of the Union for peaceful purposes. They contented themselves with militia. They renounced war between and among themselves, unless they were actually invaded and provided they did not have time to appeal to the government of their creation for protection in the hostilities which should arise between them. They had renounced the resort to war, and each state had renounced the right to make treaties with another. If neither war nor diplomacy were to settle disputes, what was to be done? They proposed, and they established, a court of the states which we know today as the Supreme Court of the United States, in which a state can sue

and be sued by a state as ordinarily individuals are sued in a court of justice. That this may be done on a larger and even more comprehensive scale is evidenced by the existence and successful operation of the Permanent Court of International Justice at The Hague.

So much for what may seem merely a domestic situation. Yet it is not without influence upon the outer world.

Canada was then an integral part of Great Britain, even if it be not so at the present time. Upon a matter of such delicacy I should not express an opinion. The fact is, however, that at a time when Canada formed part and parcel of what we can call the British Empire the two countries agreed to live in peace with each other, so that, for the past one hundred years or more there has not been, and there is not now, a soldier or a fort for the more than three thousand miles of common boundary between the Dominion of Canada and these United States of America. There is not a soldier, nor is there a fortress, marking the boundaries between the Republic of Mexico to the south of these United States, and there is not a fleet on any of the inland seas of Canada and of the United States, through which, I am informed, commerce larger than that of the Mediterranean annually passes.

Law is better than force and justice better than law. We of the west, and of European inheritance, have taken advantage of the newer traditions, and we hope that Europe will find it possible in some way to bend to its will the newer traditions of its own newer world, so that the actions of states, as well as of their peoples, shall be of law and of justice. It can be done because it has been done; those who did it felt that they were carrying into effect a European ideal, and that they were showing the possibility of its being done in Europe upon what was to them a larger and much more impressive scale.

Advocating an acceptance of the Constitution by a specially elected convention of Pennsylvania meeting in the City of Philadelphia, where but shortly before the Constitution for these United States had been drafted, James Wilson, one of its leading members and little less learned in such matters than James Madison of Virginia, said in effect on December 11, 1787, that the proposed union was and aimed to be the realization of the great project of Henry IV for the union of the European States, by which peace might be preserved, meaning, I suppose, both in Europe and in America, without the destruction of the human race. And a greater there is than James Wilson, who had been, like him, a member of the Continental Conference which had framed the Constitution, one Benjamin Franklin by name, who, as President of the State of Pennsylvania, wrote under date of October 22, 1787, to the same effect to a friend in Europe, that he, like Wilson, had been engaged for some four months of the past summer in forming a Federal Constitution for the American States, and he ventured the opinion to his correspondent that he did not see why his European friends could not carry the project of Henry IV into execution and to form one Grand Republic of the various nations and monarchies of Europe. Had the venerable doctor

stopped here, you might be inclined to consider his prophecy as a dream, or at most, a vision, but he added: "for we had many interests to reconcile." What were they? The interests of Europeans in America. He hoped at that time, and we of today hope, that the Europeans may find it possible to do in Europe what the Europeans had done in America.

To M. Briand's questionnaire on the proposed United States of Europe, the reply should be the experience of these United States of America.

So far of the material state with a human content.

10. THE VATICAN STATE

I would ask your attention now to a state so small as to be lost upon any map with which I am familiar. It is therefore difficult to call it a material state, and it differs again in having a spiritual content; and yet, if I mistake not, the State of the Vatican, created but two years ago, on February 11, 1929, some two and a half acres in extent, recognized as a state by the nations of the world, is destined to render services which can not be foreseen, or measured, or weighed in the ordinary scales of justice. We are so obsessed with bigness that we think that large states are better than little ones; and yet an Englishman, proud of the British Empire, who first gave a proper interpretation to its foreign policy, is on record that large states are generally immoral. Perhaps we might pass this by with a statement that criticism, like charity, should begin at home, and call it done.

Large states we think are somehow best qualified to settle the disputes of smaller states, although international law seems to have been largely developed by the smaller states, which only have justice for their shield and buckler, the sword being too heavy or unwieldy for their slender hand. Indeed, a friend with a biting wit has accused another of the statement, perhaps it was his own, or perhaps he evokes another, in order to conceal its authorship, that the society of nations is an agency for the settlement of the large disputes of little nations and the settlement of the small disputes of large nations. However that may be, it is well to get them settled, whether they are large or small.

The fear is, not unjustified by experience, that large states have large interests and, in deciding a question, they do not care to create a precedent which may one day be invoked against them. If they are willing to decide according to equal and exact justice, the precedent which they established would necessarily be in their favor; and, if justice were tempered with morality—not that the decision should be moral but that it must not be immoral—interest might yield to principle, but the precedent would save the large as well as the small, because right has a way of triumphing in the long run.

Did we not within a generation pay twenty-five millions of dollars in gold coin to Colombia, in the Secretaryship of State of Charles Evans Hughes, now appropriately and happily Chief Justice of the United States, for what has been called the "rape of Panama?"

A dispute laid before the State of the Vatican for decision would be free from the suggestion of material force to compel its acceptance, would be disconnected from any idea of territorial aggrandizement, would have a presumption of justice in its behalf, because the state itself is a recognition of justice, and the decision, whatever it may be, is bound to be in conformity with the moral code of the centuries and to be dominated by a spiritual conception of things which temporal judges may sometimes be without. Protestant though I be and of the Presbyterian variety, I look forward to the State of the Vatican, barely large enough for the Pontifical throne, an imponderable state, rendering services in the future even greater than the Papacy in the past, because it has neither army nor navy nor territory. It only has a conscience and law under the control of a moral and spiritual conception.

11. NEUTRALITY AND DISARMAMENT

As one topic for discussion which the Committee on Program has selected deals with the legal position of war and neutrality during the last 25 years, it would seem that I am about to trespass on forbidden ground. Yet there has been a marked tendency in the past twenty-five years to look upon war as something different from what it has been in the past, in the light of the World War from which all of us are suffering, belligerents and neutrals and in between, if any there be. The subject should not therefore be overlooked, although it may not be dwelt upon. The conditions of warfare are indeed changed. War is no longer a contest between belligerents and belligerents but between belligerents on the one hand and neutrals on the other. It would therefore seem that Powers wanting to remain neutral, that is to say, continue their transactions at home and abroad and upon the high seas, as if they were at peace or with the slightest interruption consistent with a resort to arms, should in their own interest see to it that war does not break out, as that seems to be the surest way to peace, an observation which will not provoke criticism or discussion. Therefore I shall ask your indulgence when I dwell upon one phase, and only one phase, of the subject.

One remark of a general character before passing to a particular phase of the question with which we are here permitted to deal.

In the first proclamation of neutrality, which these United States issued in the first President's first administration, he warned his fellow countrymen of their duties under the "modern" law of nations, the United States having been the first country to raise neutrality to the dignity of a statute and having modernized the law of nations in many ways, none to any greater extent than that of neutrality.

The situation, upon which I would like to say a word, is that the World War called attention, on a shocking scale, to the fact that belligerents were not content with depriving one another of their rights, but were intent upon wreaking their vengeance upon the alleged illegal activity of one or other of the belligerents at the expense of neutrals. A doctrine of Sir William Scott,

with whom I am happy to say I am connected, though somewhat distantly, so long as the first chapter of Genesis stands intact, and who sought to hide his identity in the peerage under the more aristocratic name of Stowell, was that the law of nations permitted retaliation of the belligerent upon its enemy at the expense of neutral rights, a doctrine which, one of its advocates was frank enough to mention, had brought the United States into war (he was referring to the War of 1812), and a doctrine which would have to deal in the future with the same United States of America, somewhat enlarged, somewhat more powerful, somewhat more dangerous, in the century which has elapsed, I add by way of a personal contribution.

The particular question is none other than that of armament. The fact that armament is no longer spoken of as such, but has prefixed to it words of limitation, would seem of itself to suggest a change of opinion upon that subject. Some there be, and I confess that I am of that number, who affect to believe that armament will be required until a method of settling international disputes be found which appeals to the world at large as so reasonable as to be unreasonable not to accept it.

Within national lines, the administration of justice has done away with private warfare, because it is the better remedy; and the hope of the world is, as I humbly conceive, to do on a large scale that which has justified itself within smaller dimensions. My remedy for the use of armament is therefore a court of justice, and the more courts of justice, the more efficacious the remedy, and the more lawyers, I am inclined to say, the fewer the soldiers we shall need. However, when we consider that a great chancellor of Sweden is responsible for the statement with how little reason the affairs of the world are conducted, we should perhaps be lacking in a decent respect to the opinions of mankind if we should not attempt to take a short cut by declaring that armament should be limited, and, having so declared, proceed to limit it.

All roads, they say, lead to Rome. Many of them, I am glad to add in my proper person, lead to America, to an American, by the name of Benjamin Franklin, in this particular case. One Samuel Romilly, destined to be the perfect type of the lawyer and law reformer, was very anxious to make the acquaintance of "our Benjamin," and, taking advantage of the Treaty of Independence which had just been concluded between the United States and Great Britain, he repaired to Paris with one Baynes, a young man of his acquaintance, who had a letter of introduction to the great Doctor, who, Romilly remarks, was "indulgent enough to converse a good deal with us, whom he observed to be young men very desirous of improving by his conversation." The impression of the meeting upon Romilly long survived the occasion. Later in life he wrote: "Of all the celebrated persons whom, in my life, I have chanced to see [and he was to meet the celebrated of the world], Dr. Franklin, both from his appearance and his conversation, seemed to me the most remarkable. His venerable patriarchal appearance, the sim-

plicity of his manner and language, and the novelty of his observations, at least the novelty of them at that time to me, impressed me with an opinion of him as one of the most extraordinary men that ever existed."

"The novelty of his observations" was none other than a limitation of armament, which we have from Romilly's friend, Baynes, in a diary which he kept of his short but interesting life:

Insensibly we began to converse on standing armies, and he seeming to express an opinion that this system might some time or other be abolished, I took the liberty to ask him [it is Mr. Baynes who is speaking] in what manner he thought it could be abolished; that at present a compact among the Powers of Europe seemed the only way, for one or two Powers singly and without the rest would never do it; and that even a compact did not seem likely to take place, because a standing army seemed necessary to support an absolute government, of which there were many in Europe.

May I call your attention to two statements: "a standing army" and "an absolute government in Europe," conditions which are not so prevalent or troublesome as in the days of the great Doctor and the two young men he was "very desirous of improving by his conversation?"

"That is very true," said he; "I admit that if one Power singly were to reduce their standing army, it would be instantly overrun by other nations; but yet I think that there is one effect of a standing army which must in time be felt in such a manner as to bring about the total abolition of the system." On my asking what the effect was to which he alluded, he said he thought they diminished not only the population, but even the breed and the size of the human species. "For," said he, "the army in this and every other country is in fact the flower of the nation—all the most vigorous, stout, and well-made men in a kingdom are to be found in the army. These men in general never marry."

Mr. Baynes, who seems to have counted upon his letter of introduction, was the main interlocutor, and ventured to point out an omission in the Constitution of the United States of a sufficient armed force, to which the good man and great replied, with the intuition of a philosopher and the ease of a prophet, speaking of the long distant future when they would all be gathered to the dust, that the objection was unimportant, saying:

For America is not, like any European power, surrounded by others, every one of which keeps an immense standing army; therefore she is not liable to attacks from her neighbors—at least, if attacked she is on an equal footing with the aggressor, and if attacked by any distant power she will always have time to form an army. Could she possibly be in a worse situation than at the beginning of this war, and could we have had better success?

I have quoted these passages by way of introduction as showing the problem, the consequences and the reason which have caused the United States of America to assume leadership in this beneficent movement.

In 1921, the then Secretary of State of the United States, Charles Evans Hughes, now Chief Justice of the Supreme Court, and, I am most happy to say, a member of our Society of International Law of long and of good standing, issued a double invitation to a conference in Washington: the first, of five Powers chiefly interested in the matter of armament, and, adding to the five, four other Powers having interest in the Pacific question. The four large Powers invited accepted, making a conference of five. The four additional Powers with Pacific interests accepted, making a conference of the nine when Pacific questions were bruited. The result was two conferences. Why was this so? Because the questions were interrelated. The success or failure of one or the other meant the success or failure of both.

The question was not new, and, although there were not many precedents, we Americans can justly be proud of them. One was the Bagot-Rush agreement on the Great Lakes, of 1817, which is a precedent for neutralizing large bodies of waters dedicated to a commercial purpose, whenever nations should be minded to do so; the second a reduction of naval armament by compact between the most southern republics of America, Argentina and Chile, just as the Lakes agreement was of the two most northern Powers of the other extremity of the American continents. The agreement between Chile and Argentina, of 1902, was a precedent in a very real sense, as it involved the scrapping of ships in existence and the discontinuance of the building of ships upon the stocks.

Secretary of State Hughes felt that the way to limit armament was not to bring the Powers together and to discuss the possibility of so doing, but to open the conference with a concrete proposal on the part of the United States, a proposal which was accepted and resulted in the first limitation upon a large scale, constituting a precedent for all further limitation until the question of limitation should be relegated to dead issues, when force has been superseded by justice.

Appropriately, the next great step in the advance is American: a proposal by Secretary of State Henry L. Stimson, on behalf of the administration which he represents, in 1929, of a meeting of the same five Powers, this time in London, in 1930, with the result of a further advance upon a very thorny path, not merely keeping the process alive but carrying it definitely forward toward a universal conference to meet within the year that is to come. Mr. Stimson, I am happy to say, is also a member of the American Society of International Law and likewise of good and long standing.

It is a source of regret, at least to one member, that the venerable Dr. Franklin contented himself with founding the American Philosophical Society instead of saving himself for membership in the American Society of International Law.

12. THE AMERICAS

In the observations which I have been privileged to make, the American Republics have been conspicuous by their absence. They have not been

passed over. They have not been out of mind. Their existence, as well as their contributions to international law, in the past quarter of a century is as evident as their diplomatic representatives in Washington who honor us this evening by their presence.

The subject of a world apart should be treated separately. There are twenty-one of these Americas: not twenty on one side and one on the other, but twenty-one, I repeat, in fact and in law, its application and its administration; the same law, an equal law, equally and impartially applied. Of the twenty-one, eighteen are of Spanish blood, Spanish traditions, Spanish ideals; another of these (Brazil) with whom the *Lusiadas* is a precious possession, perpetuating the traditions and the ideals of Portugal, is larger than the continental United States, and the other to the south of us, making the twentieth, although of African origin, cherishes the culture and aspirations inherent in the language of France.

Notwithstanding the differences of traditions and of language, and the vast distances which would tend to separate us, America is nevertheless a new world, a Western Hemisphere, recognizing a common destiny, irrespective of different pasts, of different races, of different languages, of different traditions.

The great Bolívar envisaged the "free and independent nations of America united with one another by a body of common laws." This common law can only be the law of nations. It can only be made by all the nations, not by any one, and it can best be made through conferences at which they meet upon a footing of equality. These conferences are the contribution of Secretary of State Blaine, who would be eligible to membership in the American Society of International Law if the Lord had not removed him from his America.

In the first of the conferences, held in this city of Washington, international law was declared to be the public law of the Americas. In the second, held in the city of Mexico, in the closing days of 1901 and the opening weeks of 1902, on the eve of our period of twenty-five years, the movement was started for the codification of international law. A treaty to that effect was negotiated in the third of the conferences, held at Rio de Janeiro, in the summer of 1906, the same year of the formation of this American Society of International Law, and a convention was adopted for the codification of international law by means of a commission of American jurists, which met appropriately in Rio de Janeiro, and agreed upon a method of procedure; but its labors were suspended by the World War. In 1923, in the fifth of the conferences of the American States, held in Santiago de Chile, the first to be held after the World War, codification took again its rightful place, and a commission composed of two members from each of the American States was appointed to meet in the city of Rio de Janeiro and take up anew the task of codification. It met in the spring of 1927, and adjourned with twelve conventions to its credit. These were passed on to the Sixth of the conferences,

held at Habana three years ago, and some of these draft conventions then assumed definite form and shape. The "free and independent nations of America" are in the process of being united by a body of common law.

But intimately as the American States may coöperate within the field of international law, there is a more extensive domain which is theirs, without raising the question of blood or of race, for there is no superior in the Republic of Letters; nor are there boundary questions, nor does one need a passport unless it be that of intelligence and of good-will, to cross the non-existent frontiers. In this field, as large as humanity, with no limit except that of intelligence, the nations of America can coöperate: they are coöperating and by their joint effort it is to be hoped that the world may be endowed with a larger and freer and a more all-embracing civilization because of the oneness of the community of the spirit with which all the American countries are animated.

An Inter-American Institute of Intellectual Coöperation was created by the sixth of the conferences at Habana, and a Congress of Rectors, of Deans and of Educators met in Habana in February of the year that is past, providing the organization and the statute of the Institute of Intellectual Coöperation, to be located in Habana, the capital of the Cuban Republic, standing at the entrance of the Americas, in touch with the south, with the center and with the north, fitted to be an intermediary of the conflicting civilizations and, without territorial boundaries or frontiers or other difficulties, to essay the rôle of conciliator. Spiritual coöperation is no longer an aspiration. It is a matter of convention. It has an organization. It has a home. The National Councils of Intellectual Coöperation are being created in each of the countries and a delegate of each will meet, it is to be hoped, in the not distant future, in the city of Habana, in order that the spiritual life of the Americas may enter upon an unending future.

Within this city of Washington and almost within a stone's throw, stands the Palace of the Americas, where the diplomatic representatives of twenty-one American countries forming the Governing Board of the Pan American Union meet to consider of the things they have in common, evidencing to the world the oneness of America, its belief in Americanism and in the hope that the labors of their hands may contribute of their might to the civilization of the past, with which, together with all other civilized nations, they are joint inheritors. Our Washington, our Bolívar, our San Martín, and I may add, our Blaine, have not lived in vain.

13. EQUALITY IN ALL HUMAN RELATIONSHIPS

If the use of the first person is compatible with a certain degree of modesty, I should wish to use it on this occasion in the last of the topics selected for discussion. The subject is one of very great importance; indeed of inestimable importance. In some *Observations* which I have recently perpetrated on *Nationality*, I have employed an expression which I

should like to quote: "The world has doubled in numbers without increasing in inhabitants." From this it will be clear that I have in mind, as Goethe puts it, "*Das ewig Weibliche*,"—the eternal woman question, or "the irrepressible woman question," as Huxley calls it, a question, however, which he went far to solve, and which the women themselves are now engaged in solving and incorporating into international agreements and therefore into international law.

It happens that the period under discussion falls within the twenty-five years allotted to me. A committee of three members, all of the American Society of International Law, was appointed by the Secretary of State, Mr. Root, then President of the Society, to consider and report upon the protection to be accorded to the citizens of the United States in foreign parts. Its members were: David Jayne Hill, then Minister of the United States to the Netherlands, Gaillard Hunt, then Chief of the Passport Bureau of the Department, and the Solicitor of the Department, who has the privilege and the honor of addressing you on this occasion. Its report was the basis of the nationality act bearing the date of the 2d day of March, 1907, most of whose dispositions, I am pleased to announce, have ceased to be law. It is what may be called a "he" statute; but I think the members of the committee have since the report discovered that the content of human kind has been extended by the discovery of a submerged one-half, and that the one-half in question has not been in favor of some of its dispositions, which may also be said of the erstwhile chairman of that body.

The American woman comes on the scene in Section 3, the opening lines being to the effect that, marrying a foreigner, she takes the nationality of her husband.

A foreign woman marrying a male citizen was by an act of the United States passed in the eighteen fifties declared to be a citizen, because of her marriage with an American citizen. The Department of State was apparently of the opinion that an American woman marrying a foreigner should acquire the nationality of her husband, thus losing her American citizenship, and it was the desire of the Department of State that the committee should so recommend, in order that the Department could then invoke its authority in behalf of a statute to that effect. This was, of course, a discrimination in favor of the American man. The provision of the statute has, however, had a two-fold advantage. It cleared up any doubt there might be as to the status of the American woman marrying a foreigner; and it concentrated criticism on the provision. So much for this phase of the question.

On August 26, 1920, the Nineteenth Amendment to the Constitution of the United States admitted all American women to suffrage on a footing of equality with their fellow countrymen. So far as we of the United States are concerned, this sounded the knell of discriminations. Suffrage has been the means by which the rights and liberties of mankind have been enlarged, and it is as never before the lever of Archimedes to move the world. Do we

not all know that the first duty of the statesman is to be elected, and are not votes, votes, whether they are of the masculine or feminine persuasion? The result has been that the nationality of the American woman is no longer affected by marriage.

However, there is still a discrimination, to the effect that an American woman may, at the time of marriage, renounce her American nationality before a court of record possessing the power to naturalize citizens. This is not as it should be. It is a discrimination at a time when the woman should be protected by law against her emotions, rather than allowed, under stress of emotion, to renounce what we consider the greatest of blessings, American citizenship.

But what of the children? They are still the father's offspring in the eyes of the law, and in the case of those born in foreign parts, they are not merely the children of the father, but, in the matter of nationality, of the grandfather as well. It would seem, therefore, that the female has no inheritable blood, if only the male be alive, while that of the male extends in our law and practice to children born of the second generation in foreign parts, if only the parent who counts has resided within the United States before the birth of the offspring in question. Yet it would require no medical skill of unusual degree to determine that the blood in each case was not at fault; that it was rather the man-made law, the statute in question dating from the very first act passed by the first Congress of the United States under the Constitution.

There is a discrimination also affecting foreign women within the United States, as well as the native born. Neither one nor the other possesses as yet the civil rights which the men possess. This is, however, a passing phase, as American as well as many other women have the right of suffrage, which is bound to carry in its train a single law, with an impersonal application in all human relationships.

The entire subject, not merely of nationality but of civil and political rights, has become international by resolutions of the last two conferences of the American States. A resolution was passed by the Fifth Conference at Santiago de Chile on April 26, 1923, recommending that future conferences study the means of abolishing the legal incapacities of women and of granting to them "the same civil and political rights . . . enjoyed by men"; that the "American Governments promote the moral, intellectual and physical education of women"; that they revise their civil legislation to remove inequalities "because of sex"; that they prepare memoirs on the position and cultural development of women under their Constitutions and laws; and finally, that women be members of the delegations to future conferences.

This was a word of advice to the Americas, and it has been heeded by governments of the New and the Old Worlds. Women plenipotentiaries made their appearance for the first time in the first Conference for the

Codification of International Law, held at The Hague in 1930. We are therefore dealing with a *fait accompli*.

The question was indeed included in the program of the Sixth Conference. As it was not acted upon by that body, a committee of the National Woman's Party asked for a hearing before the conference. Because of their intervention, it was decided by the heads of the twenty-one delegations, the committee of conference charged with such matters, "to invite, with extra-official character, the representatives of the various feminist associations which have requested the audience, to set forth," on February 7, 1928, "before the conference, at a plenary meeting and after its agenda has been exhausted, their viewpoints on the matter of civil and political rights for woman."

In accordance with this resolution, the representatives of the women appeared and on the 18th day of February, 1928, the following resolution was adopted without dissenting vote:

That an Inter-American Commission of Women be constituted to take charge of the preparation of juridical information and data of any other kind which may be deemed advisable to enable the Seventh International Conference of American States to take up the consideration of the civil and political equality of women in the continent.

Said commission shall be composed of seven women from various countries of America appointed by the Pan American Union, this number to be increased by the commission itself until every Republic in America has a representative on the commission.

It is doubtless a matter of interest that the chairman of this commission, Miss Doris Stevens, is not only a citizen of the United States in the fullest sense of the word, but also a member in good standing of the American Society of International Law.

At the first Conference for the Codification of International Law, held at The Hague, in the spring of last year, a convention on nationality was adopted, discriminatory in its sections dealing with women and children. The Government of the United States did not approve of the convention for two reasons, one of which was stated in a press release of the Department of State of April 15, 1930:

We do not in our laws make differences—or make few or relatively unimportant differences—as to rights of men and women in matters of nationality. While the convention adopted as to nationality did something which tended to ameliorate the condition of women it did not in our view on the whole offer sufficient advantages to make it satisfactory.

This pronouncement apparently voices the view of the Department of State and of the United States on this important question, an enlightened view which meets with the approval of the American women, the press release stating that it has "been enthusiastically approved by them."

The first Conference for the Codification of International Law recommended to the nations:

(1) to introduce into their law the principle of the equality of the sexes in matters of nationality, taking particularly into consideration the interests of the children;

(2) and especially to decide that in principle the nationality of the wife shall henceforth not be affected without her consent either by the mere fact of marriage or by any change in the nationality of her husband.

A provision of the seventh article of the Covenant of the League of Nations, to which some fifty-seven states are parties, provides: "All positions under or in connection with the League, including the Secretariat, shall be open equally to men and women."

And on the 24th day of January of the present year, upon the motion of Mr. Matos of Guatemala, with the support of Messrs. Zumeta and Barreto, of Venezuela and Peru, respectively, members of the Council of the League of Nations, the following resolution, presented at the request of Miss Alice Paul, Chairman of the Committee on Nationality of the Inter American Commission of Women, also a member of our Society, was adopted:

The Council will remember that the question of the nationality of women was discussed at length at the Conference for the Codification of International Law held at The Hague in March and April 1930. The discussion did not result in an international settlement of this question. The States were, in particular, recommended to study the question whether it would not be possible

(1) to introduce into their law the principle of the equality of the sexes in matters of nationality, taking particularly into consideration the interests of the children.

(2) and especially to decide that in principle the nationality of the wife should henceforth not be affected without her consent either by the mere fact of marriage or by any change in the nationality of her husband.

It is to be noted that there is a clear movement of opinion throughout the world in favor of a suitable settlement of this question.

Various members of the Council have received petitions from women's organizations urging the Council to appoint a Committee of women to consider the question of the nationality of women and submit a report on the subject to the 1931 Assembly.

We venture to propose the adoption by the Council of the following resolution:

The Council,

Decides to place on the agenda of the next session of the Assembly the question of the continued study of the nationality of women, and

Requests the Secretary-General to submit to the Assembly a report on the question after consultation of the following organizations which have been especially concerned with the nationality of women.

The International Council of Women,

The International Home Suffrage Alliance,

The Women's International League for Peace and Freedom,

The Inter-American Commission of Women,
 The Equal Rights International,
 The World Women's Union,
 The All-Asian Congress of Women,
 The International Federation of University Women,
 The Young Women's Christian Association.

The Secretary-General is authorized if he thinks fit to request the above named organizations to set up a committee consisting of two representatives of each organization with the task of formulating joint proposals to be attached to the report to be submitted to the Assembly.

The resolution was passed. The precedent initiated by the Americas has now been extended through the Council of the League to the world at large. The question, therefore, is in all its phases international. The question, therefore, is international. *Das ewig Weibliche*, if we prefer the poet's expression, or "the irrepressible woman question," if we prefer the anatomist, has become a diplomatic question in the highest sense of the word. It has begun; it has assumed importance within the past twenty-five years; and one does not need to be a prophet to predict that when the American Society of International Law passes into the hands of a succeeding generation to celebrate its fiftieth anniversary, discriminations, whether domestic or international, will have but an historical interest.

Being a diplomatic and international question, already discussed at international conferences, it is fitted for an international agreement, and, so far as this phase of the subject is concerned, it might be of a single article, if it related to nationality, as has already been proposed:

The contracting parties agree that, from the going into effect of this treaty, there shall be no distinction based on sex in their law and practice relating to nationality.

Or, if all phases of the subject were to be determined, that also could be done within the compass of a single provision and of but three lines, in a formula likewise before the world:

The contracting states agree that upon the ratification of this treaty, men and women shall have equal rights throughout the territory subject to their respective jurisdictions.

A treaty with such provisions would be in line with the treaties which have been concluded from the first exercise of the treaty-making power, would equalize the rights of foreigners and natives, which one day will be done, and best done, by a multilateral treaty, to which all the states of the international community are parties. When this is done, there will be a single law, with a single and impersonal application in every one and in all of the states forming the international community, and the citizens or subjects of these states will be co-terminous and identical with humanity, which always was, which is and ever should be above and beyond any nation or any group of nations, however great, however powerful, however civilized.

14. WHAT CONSTITUTES A STATE

I have abounded in the ideas and ideals of members of the American Society of International Law, and I have even gone so far as to express regret that our Benjamin Franklin is lacking to our glory. That I may not be accused of confining myself to the members of the Society or to Americans, I shall close these observations with a few lines from an Englishman, Sir William Jones by name, to whom, as a staunch friend of the American cause, the world did not seem to be "turned upside down", and who, as a lawyer and judge would assuredly have been an honorary member of the American Society of International Law, if he were living in this world of ours today. As a poet and scholar, he best states the views which I have sought to embody in this address, in lines which are indicative of its spirit and with which I would like to bring it to a close:

What constitutes a state?
 Not high-raised battlement or laboured mound,
 Thick wall, or moated gate;
 Not cities proud, with spires and turrets crowned;
 Not bays and broad-armed ports,
 Where, laughing at the storm, rich navies ride;
 Not starred and spangled courts,
 Where low-born baseness wafts perfume to pride;
 No—men, high-minded men,
 With powers as far above dull brutes endued,
 In forest, brake, or den,
 As beasts excel cold rocks and brambles rude;
 Men, who their duties know,
 But know their rights, and, knowing, dare maintain;
 Prevent the long-aimed blow,
 And crush the tyrant, while they rend the chain;
 These constitute a state;
 And sovereign Law, that with collected will
 O'er thrones and globes elate,
 Sits empress, crowning good, repressing ill.
 Smit by her sacred frown
 The fiend Dissension like a vapour sinks,
 And e'en the all-dazzling Crown
 Hides his faint rays, and at her bidding shrinks.

Ladies and gentlemen, I have endeavored to the best of my ability to comply with the request of the Committee on Program and to state in a general way some of the chief achievements, as it seems to me, of the international community in the past quarter of a century. It has been, I assure you, a difficult task, and while I wish I might be with you in person at the fiftieth anniversary, there is at least one consolation in being present only in the spirit, that by no chance or mischance could I ever be asked to deliver another address upon the progress of international law within 25 years.

The PRESIDENT. Will the Secretary give us the pleasure of listening to the able and accurate and interesting report which I am sure he has prepared for our enjoyment and edification this evening. Mr. Finch!

Secretary GEORGE A. FINCH. Mr. President, ladies and gentlemen, it is a very great relief indeed to be able to state that I am not called upon to make any report covering the last 25 years. The contents of my paper are limited to the last year, to informing members of the Society in a very summary way what has happened in our particular field since the last meeting, giving a sort of background for our papers and discussions during the present meeting.

REPORT OF THE SECRETARY FOR THE YEAR 1930-1931

To the President and Members of the American Society of International Law:

The preceding year has witnessed an unusual number of political disturbances of a serious nature within national boundaries, especially in the Western Hemisphere. Revolutions have taken place in Argentina, Brazil, Bolivia, Guatemala, Panama, and Peru, and have recently extended to Spain. The immediate concern of international law with such internal civil changes is in the matter of the recognition of the new governments that come into power. The action of the Government of the United States with reference to some of these occurrences in America has been the subject of discussion among high authorities in international law, who have not been in entire agreement on the principles applicable to the situation. Opportunity has accordingly been given in the program of the present meeting for the members of the Society to express their views.

Despite the distress prevailing throughout the world due to the economic depression, which is said to be the cause of the unrest prevailing within nations, peace has prevailed between nations, and the year has been marked by great activity on the part of the forces working for the promotion of the establishment of international relations on the basis of law and justice. This activity has logically been conspicuous in the sphere where the danger of disorder chiefly lies, namely, in the economic relations of nations. Some seventy commercial conventions and arrangements have been concluded among 41 countries, mostly European.

In addition to these bilateral agreements, important efforts have been made for united action by groups of nations. A Second Conference for Concerted Economic Action was held at Geneva, November 17-28, for the purpose of making effective and continuing the work of the first conference held February 17-March 24, 1930. Twenty-six European states took part in the second conference, and six non-European states, including the United States, were represented by observers. The conference considered means for bringing into force the Commercial Convention signed March 24, 1930, by which the contracting states undertook to provide some measure of tariff stability pending negotiations for collective economic agreements. It discussed the different methods of negotiating tariff reductions, considered a

request of the agricultural countries of Eastern Europe for a preferential régime, urged additional ratifications of the Convention on Import and Export Prohibitions and Restrictions, and recommended continued efforts for the negotiation of a convention on the treatment of foreigners.

Impetus to a more pretentious effort was given by M. Briand, Minister for Foreign Affairs of France, who, on May 17, 1930, sent to 26 governments of Europe a memorandum giving in more detailed form the suggestions for a European economic union made in his address before the Tenth Assembly of the League of Nations on September 5, 1929. The essential objective of the proposal was said to be an "association in the service of the collective work of pacific organization of Europe." The plan provided that the signatory governments would engage to make regular contacts, in periodical or extraordinary meetings, for the examination in common of all questions which might confront primarily the community of European peoples; these contacts to take place through the medium of (1) a representative and responsible organ called the European Conference, to be composed of representatives of all the European Governments which are members of the League of Nations, and which would act in liaison with the League, (2) an executive organ in the form of a Permanent Political Committee, composed of a certain number of members of the conference, which would undertake to develop the constituent elements of the future Federal European Union, and (3) a secretariat service for the administrative execution of the work of the conference and committee.

A report on the replies to the French memorandum was submitted to a meeting of the representatives of European States at Geneva on September 8, 1930. The report stated that the need for coördination in Europe is recognized by all the governments consulted; that all the governments are at one in their anxiety to do nothing that might weaken the authority of the League of Nations; and that the European governments were also at one in accepting the fundamental principle that the proposed European organization could not be opposed to any ethnographical combination outside the League, either in Europe or in other continents. The French report also stated that immediate accession could be secured to an agreement involving the signatories in no other commitment than that of taking part in meetings held regularly or on special occasions to examine such questions as they might consider to be of common interest to them all. There was no general agreement in the replies as to the machinery proposed by the French Government for the organs of the union. A few governments favored the establishment of the proposed European Conference, Permanent Political Committee, and Secretariat; others feared that such new bodies would become confused with the League of Nations, while others thought the form of organization should be postponed for future consideration.

The Eleventh Assembly of the League of Nations, on September 16, 1930, adopted a resolution inviting the European members, acting as a

League committee and with the help of the League Secretariat, to pursue the inquiries further and report to the next assembly. This committee, designated the Committee of Enquiry for European Union, organized at Geneva on September 17, 1930, and held a second meeting at the same place January 16-21, 1931. A resolution was adopted by the Foreign Ministers or responsible representatives of the 27 governments who took part, declaring that, notwithstanding the political difficulties of Europe, accentuated by the economic instability and unrest growing out of the world depression, those governments were resolutely determined to use the machinery of the League of Nations to prevent any resort to violence. Turkey and Soviet Russia, as well as Iceland, were invited to participate in the work of the committee; and a meeting was proposed of the grain exporting countries of Central and Eastern Europe and European importing countries to make a common effort to find means of disposing of grain surpluses. A committee was appointed to study the question of agricultural credit for Europe. Representatives of 24 grain exporting and importing states met at Paris, February 23-26, 1931, and adopted a final act concerning the disposal of the present surplus, which was signed by 17 states. A second committee to consider the disposal of future grain surpluses met in Paris, February 26-28, 1931, and adopted a report which recognized that the disposal of surplus European cereals is not merely a European but a world problem, and expressed the wish that all countries concerned agree to take part in a conference to be organized by the International Institute of Agriculture at Rome.

Another movement looking to the solidarity of regional interests was started in the Balkans. A conference, called the First Balkan Conference, opened at Athens on October 5, 1930, and remained in session for eight days. While this conference was unofficial, the governments of the six Balkan countries interested themselves in the composition of the delegations, which represented the political, economic, social, and intellectual life of the countries concerned. A former Prime Minister of Greece presided over the plenary sessions. Important resolutions and draft conventions were drawn up by six committees on organization, political questions, economic questions, intellectual coöperation, communications, and social problems, and adopted by the conference. Statutes were likewise adopted for a permanent institution to be known as the Balkan Conference, the aim of which shall be "to contribute to the *rapprochement* and collaboration of the Balkan peoples in their economic, social, cultural and political relations, with the object of finally directing this *rapprochement* towards the union of the Balkan States." The statutes provide for regular meetings of the conference in the six countries in turn, and for its organization in the form of a General Assembly, a Council, and a Secretariat. The General Assembly will meet in October of each year with thirty delegates from each country, the governments to send observers. Among the resolutions adopted by the first conference was one recommending that the Foreign Ministers of the Balkan States meet regu-

larly each year to exchange views on Balkan affairs; that a study be undertaken of a pact between the Balkan nations providing for the outlawry of war, the settlement of all differences by pacific means, and for mutual assistance between the Balkan nations in case of a violation of the pledge not to go to war.

International aerial law received great attention both from governments and private organizations. The Fourth Juridical Congress of the International Commission of Wireless Telegraphy met at Liège from September 22nd to 26th, with representatives of 17 nations and the League of Nations. The 18th session of the International Commission on Aerial Navigation met at Antwerp from June 24th to 27th; the League of Nations Air Transport Co-operative Committee held its first session July 9-12; the Fifth International Aeronautical Congress met at The Hague, September 1-6; the International Juridical Committee of Aviation held its ninth session at Budapest, September 29-October 3, with representatives from 22 countries; and the First International Conference for Aerial Safety met at Paris, December 8-23. An Air Mail Conference between twelve European postal administrations was held at Brussels, October 13-15. Air mail agreements were negotiated by the Netherlands with India and Australia, and aviation agreements were made by Canada and the United States, Belgium and France, France and Poland, and Rumania and Poland.

Arbitration treaties were signed between Latvia and Lithuania, and between the United States and Iceland and China. Such treaties were ratified between Persia and Afghanistan, Belgium and Yugoslavia, and between the United States and Italy and the Netherlands.

Conciliation and arbitration treaties were signed between the United States and Greece, and Greece and Hungary, and ratified between Austria and Greece, Poland and the Netherlands, and between the United States and Belgium, Luxemburg, Estonia, Greece, and Latvia.

Treaties of friendship, some including arbitration, non-aggression, or co-operation, were concluded by Persia with France, Germany, Greece, Turkey and Czechoslovakia; by Germany with Nejd; by Turkey with Lithuania and Greece; by Afghanistan and Estonia, Austria and Hungary, and Bulgaria and Czechoslovakia.

Boundary treaties were concluded between France and Great Britain concerning Togoland; between Honduras and Nicaragua, Guatemala and Honduras, and Great Britain and Norway exchanged notes recognizing Norwegian sovereignty over the Jan Mayen Island. Bolivia and Paraguay exchanged forts in disputed territory, and frontier agreements were made by Iraq and Transylvania, Estonia and Latvia, and Chile and Peru.

Negotiations have been continued by China with the Powers which maintain concessions and exercise extraterritorial rights on behalf of their nationals in that country. The proposals of the great Powers, including the United States, for the gradual relinquishment of extraterritoriality *pari passu*

with the establishment of stable government and the modernization of Chinese law and judicial institutions, have not been acceptable to the Chinese Nationalist Government, which has recently complained that the negotiations have been too much delayed. More progress has been made by China in other directions in obtaining relief from what she calls the "unequal treaties". A treaty restoring China's tariff autonomy was signed with Japan on May 6th, and a similar treaty with The Netherlands was ratified on November 18th. On December 31st an agreement was reached with Japan in regard to the Tsingtao cables. The agreement of August 31, 1929, for the return of the Belgian concession in Tientsin has been ratified, and notes have been exchanged with Great Britain for the rendition of her concessions at Amoy and Wei-hai-wei. One of the obstacles which stood in the way of the restoration of tariff autonomy, namely, the collection of the internal transport tax called *likin*, was declared abolished as of January 1st in an announcement of the Minister of Finance made December 17th.

The Eleventh Session of the Assembly of the League of Nations was held in Geneva from September 10th to October 4th. Fifty-two of the 54 members of the League were represented. There were 24 plenary meetings of the Assembly in addition to the meetings of the six committees among which the work on the agenda was divided. Guatemala, the Irish Free State and Norway were elected non-permanent members of the Council of the League in succession to Cuba, Canada and Finland. For 1930-1931, the Council is composed of Germany, the British Empire, France, Italy, and Japan, permanent members; and Spain, Guatemala, the Irish Free State, Norway, Peru, Persia, Poland, Yugoslavia, and Venezuela, non-permanent members. A notable accomplishment of the session was the signature on October 2, 1930, by 28 members of the League, of a convention on financial assistance under which the Council will be enabled, in the interest of peace, to authorize the granting of financial assistance to states members of the League involved in war as victims of aggression or threatened by war. The assistance will take the form of a loan issued in the money market, contracted by the beneficiary on the security of its revenues and guaranteed by the other signatories under the auspices of the League. The sum of at least fifty million gold francs must be guaranteed by the signatories for the annual service of possible loans.

Four sessions of the Council of the League of Nations were held during the year: the 59th session, May 12-15, 1930; the 60th session, September 8-12, 1930; the 61st session, September 17-October 3, 1930; and the 62nd session, January 19-24, 1931.

The amendments to the Preamble and to Articles 12, 13 and 15 of the Covenant of the League of Nations, recommended by a committee on March 5, 1930, acting under a resolution of the Tenth Assembly of the League which declared that "It is desirable that the terms of the Covenant of the League should not accord any longer to members of the League a right to have re-

course to war in cases in which that right has been renounced by the provisions of the Pact of Paris," were not adopted by the Eleventh Assembly, but were referred in modified form to the members of the League for further examination. The new texts were formulated by a special subcommittee of the Assembly Committee on Legal Questions. In reporting that the question of the adoption of these amendments was not ripe for decision this year, the subcommittee called attention to the fact that some members of the League have not acceded to the Pact of Paris, and accordingly do not stand in the same relation to the problem as the members of the League who are signatories of the Pact; that certain of the states which signed or acceded to the Pact of Paris accompanied their signatures or accessions by interpretations, and the question had to be studied whether these interpretations might have the same effect upon the Covenant of the League of Nations should the principle of the prohibition of resort to war be introduced into the Covenant from the Pact; that the proposed amendments have given rise to other questions as to the problem of the incompatibility of the amended Covenant of the League of Nations with other treaties and the situations which were the object of express reservations when the Pact of Paris was concluded; and that the question of the conditions of the application of the sanctions of Article 16 of the Covenant to new obligations is a question on which all the members of the League do not as yet hold the same views.

The Protocol of September 14, 1929, containing amendments to the Statute of the Permanent Court of International Justice, was to enter into force on September 1, 1930, provided the Council of the League of Nations had satisfied itself that the parties to the court which had not ratified the amendments by that date had no objection to their coming into force. These conditions were not fulfilled by September 1, 1930, and the Protocol of Amendment accordingly did not go into effect. Some of the most important amendments, however, have been made effective through different procedures, to be shortly mentioned.

Other activities of the League are referred to under separate topics treated in this report.

On January 1, 1931, the Permanent Court of International Justice began its second nine-year term with a new panel of judges elected by the Council and Assembly of the League of Nations on September 25, 1930. The Honorable Charles Evans Hughes, recently the President of the American Society of International Law, resigned from the court on June 16, 1930, because of his appointment as Chief Justice of the Supreme Court of the United States, and the Honorable Frank B. Kellogg, an Honorary Vice President of this Society, was elected to the vacancy. In September, the Council and Assembly, acting under Article 3 of the Statute, increased the number of judges from eleven to fifteen, and the following were elected as members of the court for the period from January 1, 1931, to December 31, 1939: Mr. Mineitcero Adatei, of Japan; Mr. Dionisio Anzilotti, of Italy; Mr.

Henri Fromageot, of France; Sir Cecil James Barrington Hurst, of Great Britain; Mr. Rafael Altamira y Crevea, of Spain; Mr. Willem Jan Mari van Eysinga, of The Netherlands; Mr. J. Gustavo Guerrero, of Salvador; Baron Rolin Jaquemyns, of Belgium; Mr. Frank B. Kellogg, of the United States; Count Michel Rostworowski, of Poland; Mr. Walther Schücking, of Germany; Mr. Wang Chung-Hui, of China; Mr. Antonio Sánchez de Bustamante, of Cuba; Mr. Démètre Negulesco, of Rumania; and Mr. Francisco José Urrutia, of Colombia. As deputy-judges, the Council and the Assembly elected Mr. Rafael Waldemar Erich, of Finland; Mr. José Caeiro da Matta, of Portugal; Mr. Miléta Novakovitch, of Yugoslavia; and Mr. Joseph Redlich, of Austria.

The 18th session of the court was held from June 16 to August 26, 1930. At this session two advisory opinions were rendered, one on the interpretation of the term "communities" in the convention of November 27, 1919, between Greece and Bulgaria, and the other answering in the negative the question whether the Free City of Danzig might become a member of the International Labor Organization.

The 19th session of the court took place from October 22 to December 6, 1930, and dealt with the second stage of the case of the free zones between France and Switzerland. The court made an order on December 6th extending the time in which the two governments might come to an agreement in regard to the customs régime in these zones.

On January 15, 1931, the new panel of judges met in the 20th session of the court for the purpose of organizing and revising the rules. The revised rules provide, among other things, that the ordinary sessions of the court shall open on February 1st (instead of June 15th) in each year and continue until all cases and opinions docketed in the session list are finished. The president may summon an extraordinary session whenever he thinks it desirable. Judges are bound to be present at the ordinary sessions of the court and at all sessions to which they are summoned by the president, unless they are on leave or are prevented by illness or other serious reasons communicated to the court through the president. Judges whose homes are situated more than five days' normal journey from The Hague are entitled to six months' leave during every three-year period, but more than two judges may not be on leave at any one time. The court adopted a resolution to the effect that "The Court considers it desirable that it should not be convened between July 1st and October 1st except for urgent cases." This session closed on February 21st. The 21st session opened on April 15th.

On December 10th last, the President of the United States transmitted to the Senate the Protocol of Signature of the Statute of the Permanent Court of International Justice of December 16, 1920, and the Protocol of Accession of the United States and the Protocol for the Revision of the Statute, signed September 14, 1929, for its advice and consent to the adherence of the United States. A week later, the Committee on Foreign

Relations decided to postpone its report to the Senate on these protocols until the opening of the regular session of Congress in December, 1931. On January 21, 1931, the Honorable Elihu Root, the first and for seventeen years the only President of this Society, who played an important part in the drafting of the Statute of the Court and of the formula for the acceptance of the reservations attached to American adherence on January 27, 1926, appeared before the Senate committee and made a statement with reference to the interpretation of the provisions of the Protocol of Accession concerning advisory opinions. Discussion of this provision has arisen over the question whether it amounts to an acceptance of the Senate reservation that the court shall not, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest. By some, the protocol has been interpreted to mean that in case of a final failure of the United States and the League of Nations to agree as to whether a request for an advisory opinion touches a dispute in which the United States has or claims an interest, the court may proceed to render the advisory opinion over the objection of the United States, leaving the United States to withdraw from the court. Mr. Root, before the Senate committee, denied that this was the proper interpretation of the protocol. In the case mentioned, he stated that as long as the United States remains a party to the court and refuses to forego its objection to the rendering of an advisory opinion, the court would lack the jurisdiction to render such an opinion. The question of the accession of the United States to the court under this protocol has been placed upon the program of the present meeting. The interpretation of the protocol will be expounded by competent authorities, and the members of the Society will have the opportunity to express their views upon it.

Besides the international cases which have come before the Permanent Court of International Justice, a number of other cases were adjudicated before separate *ad hoc* tribunals or commissions.

The General Claims Commission and the Special Claims Commission established by the United States and Mexico to adjudicate claims for pecuniary damages held sessions during the year and rendered a number of decisions.

The Mixed Claims Commission between the United States and Germany on October 16, 1930, decided that Germany was not responsible for the destruction of large quantities of war materials in the United States during the period of this government's neutrality, in the two alleged sabotage cases known as the Black Tom Case and the Kingsland Case.

On June 5, 1930, the War Claims Arbitrator under the War Claims Act of 1928 found the amounts due the German owners for the value of German merchant vessels seized by the United States during the World War.

On July 24, 1930, the Chief Justice of British Honduras, acting as arbitrator of the claim of the United States against Guatemala on behalf of the

American citizen Shufeldt, awarded the claimant the sum of \$225,000 as indemnification for damages and injuries caused to him by the cancellation of a concession contract by the Government of Guatemala.

In an arbitration between Italy and Venezuela before a mixed commission, the Swedish umpire, M. Unden, rendered an award on May 3, 1930, holding that the Italian company of Martini had been the victim of a patent injustice by the Venezuelan Court of Cassation in holding that the company was in default in making certain payments under its concession contract. The tribunal awarded the annulment of the obligation to make the payments required by the court.

On September 2, 1930, a court of arbitration in London rendered an interesting decision in an arbitration between Great Britain and the Soviet Government. The court was composed of a British and a Russian subject, with a German as umpire, but the Russian arbiter withdrew. The court held that the agreement between the British company Lena Goldfields and the Soviet Government was dissolved because of its breach by the government, and awarded the company a sum of nearly £13,000,000 on the principle of the "unjust enrichment" of the government at the expense of the company.

Interest in the codification of international law has not diminished following the first official conference held at The Hague in March-April, 1930. At the request of the Assembly of the League of Nations, the Council has invited the governments which took part in that conference to communicate their observations on the suggestions of the first conference with regard to future work, and in particular the procedure to be followed in preparing for future conferences. The continuation of this series of official conferences will therefore probably depend upon the replies which the governments make to this inquiry.

The Advisory Committee of the Research in International Law, organized by the Harvard Law School to explore, from a scientific and non-governmental point of view, the subjects which have been or may be considered with a view to codification, has worked steadily during the past year in continuation of the work which it undertook in preparation for the first codification conference. Some 40 or 50 members of the Society are also members of this Advisory Committee. Its work in preparing drafts with scientific comments on the subjects of nationality, territorial waters, and responsibility of states, for the use of the first codification conference has received the high commendation of the Secretary of State of the United States and the Secretary General of the League of Nations. Since the last meeting of the Society, the Advisory Committee and its reporters have been engaged in formulating drafts on four additional subjects which the League of Nations Committee for the Progressive Codification of International Law has recommended as ripe for codification, namely, diplomatic privileges and immunities, piracy, legal position and functions of consuls, and competence of courts

in regard to foreign states. At a meeting held in Cambridge, Mass., on February 22nd last, the Advisory Committee adopted a resolution expressing the opinion that the continuation of the codification movement is essential to the satisfactory development of international law, and expressed the hope that arrangements will soon be begun for a second codification conference.

Alongside of these efforts for the codification of general subjects of international law, numerous conferences have been held during the year having for their object the clarification and the improvement of various special topics of international law, both public and private:

The first European conference on the unification of river law was held at Geneva, November 17-December 9, and concluded three conventions dealing with the right to a flag of vessels engaged in inland navigation, the registration of such vessels, and rules concerning collisions between them.

An International Conference for the Unification of Laws on Bills of Exchange, Promissory Notes and Cheques was held at Geneva, May 13-June 7. The object of the conference was to remedy the difficulties caused in commercial transactions by the diversity of national laws. The conference was attended by representatives of 33 states, including the United States. It adopted three separate conventions for the elimination of differences in laws of the "continental type" on bills of exchange. Two of the conventions were signed by 22 states and all three by 23 states. The question of cheques was reserved for a second session, which opened on February 23, 1931.

An international conference on buoyage and the lighting of coasts met at Lisbon, October 6-23, attended by delegations from 32 states. A series of recommendations were adopted regarding lighthouses, an agreement was signed on maritime signals and lightships, and the consideration of regulations on the unification of buoyage was postponed for future study.

The International Maritime Committee met at Antwerp, August 1-5, and considered the subject of insurance of passengers.

The Baltic and International Maritime Conference, with representatives from 21 nations, met at Copenhagen on May 30th.

An international load line conference met at London, May 20-July 7.

A League of Nations committee, meeting in Berlin, April 3-5, drew up a draft convention for the international protection of whales.

A conference in which the representatives of twenty countries participated, was held at Warsaw, October 8-11, and made recommendations concerning further steps to eradicate the white slave trade.

The International Labor Conference held its 14th session at Geneva June 10th, and the International Institute of Agriculture held its 10th session in Rome, October 14-20.

The eleventh annual International Railway Congress met in Madrid, May 5-15; a European conference on road traffic met at Geneva, March 16, 1931; the 6th International Road Congress was held in Washington, October

6-11, and the Pan American Conference on Automotive Traffic was held in the same city October 6th.

The 36th Conference of the International Law Association was held in New York, September 2-10, 1930, with members in attendance from 25 nations. In addition to discussing several important questions of private international law, the conference adopted the draft of a convention on the rights and duties of belligerents with regard to neutral property at sea.

While the world has been engaged in this multitude of constructive activities to promote the peaceful intercourse of nations and their peoples, and many more which might be mentioned did time and space permit, the dangers which lie in the maintenance of excessive armaments for war have not been overlooked, and the preceding year has seen greater progress in this respect than any other during recent years.

The peace treaties which ended the World War in 1919 envisaged a general limitation of the armaments of all nations. (Part V of the Treaty of Versailles, for example.) The treaties themselves provided for the effective limitation of the armaments of the defeated belligerents, but the armaments of the victors were left to the future action of the League of Nations. (Article 8 of the Covenant.) The work of the League commission appointed to advise the Council as to the execution of these provisions of the Covenant has so far been only of a preparatory nature. But the five Powers most seriously burdened with large navies created for the exigencies of the war, met in conference upon the invitation of the United States and concluded at Washington on February 6, 1922, a treaty limiting battleships and aircraft carriers. The treaty left unrestricted competition in cruisers, destroyers and submarines. On April 22, 1930, the same Powers signed at London a second treaty in which they agreed to regulate the categories not included in the treaty of 1922. This treaty went into effect on January 1, 1931, as between Great Britain, Japan, and the United States. The treaty contains, in addition, a six-year extension of the limitation on battleships, in which all five signatories have joined. They are likewise parties to the acceptance of a rule of international law contained in Article 22 of the treaty outlawing ruthless submarine warfare, and have invited all other Powers to express their assent to the rule.

The results of the London Naval Conference led the Assembly of the League of Nations at its eleventh session in September, to express the hope that the League Preparatory Commission would be able to terminate its work and enable the Council to summon a general conference on the reduction and limitation of armaments as soon as possible. The Preparatory Commission accordingly held a final session from November 6th to December 19th, when it finished its work on the draft of a convention. This draft convention was considered by the Council of the League at its 62nd session, January 20 and 24, 1931, and the Council fixed the date and place of the First General Conference for the Reduction and Limitation of Armaments

for the Tuesday following the end of the Council session opening on January 25, 1932, at Geneva.

In recommending the London Naval Treaty to the special session of the Senate called for the purpose of considering it, President Hoover said:

Our people believe that military strength should be held in conformity with the sole purpose of national defense; they earnestly desire real progress in limitation and reduction of naval arms of the world, and their aspiration is for the abolition of competition in the building of arms as a step toward world peace. . . .

History supports those who hold to agreement as the path to peace. Every naval limitation treaty with which we are familiar, from the Rush-Bagot agreement of 1817, limiting vessels of war on the Great Lakes, to the Washington Arms Treaty of 1921, has resulted in a marked growth of good will and confidence between the nations which were parties to it. . . .

We have only to look at the state of Europe in 1914 to find ample evidence of the futility and danger of competition in arms.

MESSAGE TO MR. ELIHU ROOT

Mr. CHARLES HENRY BUTLER. Mr. President, we listened with great interest to the reading of the letter to you from our first president. I think it would be most appropriate on this occasion if we recognize that that letter was written not only to yourself but to the Society. Therefore I move you, sir, that the President and Secretary be requested and instructed to send to Mr. Root the following message:

Resolved, that the members of the American Society of International Law, at the 25th annual meeting, express their regret that the first president of the Society, and the one who contributed so much to its success, is not able to be with us on this occasion, and we express our deep appreciation of his letter to President Scott which has been read to the Society.

(The motion was duly seconded and unanimously agreed to.)

ELECTION OF COMMITTEE ON NOMINATIONS

The PRESIDENT. The election of the Committee on Nominations for officers of the Society, is the next order of business.

Mr. CHARLES HENRY BUTLER. I place in nomination for that committee, Messrs. Henry W. Temple, Manley O. Hudson, Charles E. Martin, Green H. Hackworth, and Charles Warren.

(There being no further nominations, upon motion, duly made, seconded, and carried, the nominations were closed, and the Secretary was instructed to cast the ballot of the members present for the nominees. The Secretary reported that he had cast the ballot, and the President declared Messrs. Temple, Hudson, Martin, Hackworth and Warren duly elected to the Committee on Nominations.)

The PRESIDENT. Is there any further business to come before the meeting this evening? If not, the Chair declares the session this evening terminated, and we will meet tomorrow morning at 10 o'clock in this room to discuss "The obligatory jurisdiction of the Permanent Court of International Justice."

(Thereupon, at 10.50 o'clock p. m., an adjournment was taken.)

SECOND SESSION

Friday, April 24, 1931, 10 o'clock a. m.

The meeting was called to order at 10 o'clock a. m., in the Willard Room of the Willard Hotel, President James Brown Scott presiding.

The PRESIDENT. Ladies and gentlemen: The subject for this morning is "The obligatory jurisdiction of the Permanent Court of International Justice"—a timely subject, and, in addition, one of the most important questions which could be discussed here or elsewhere, and which in the fullness of time will be discussed upon the floor of the Senate of the United States. The views which you express on this occasion may be of advantage to those who have to deal professionally and officially with the question.

The first paper is by Mr. Amos J. Peaslee, of the New York Bar, an old (although young in years) and a valued member of the Society.

OBLIGATORY JURISDICTION OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

BY AMOS J. PEASLEE

Of the New York Bar

Mr. President, Ladies and Gentlemen:

The Society of Nations in taking its inventory for the year 1931 of its tribunals, commissions, pacts, conventions, ratifications—conditional, reciprocal and otherwise, its covenants—multilateral and bipartite, is strictly abreast of the times. It is experiencing what some describe as "over production." It needs a simplification and standardization of product. Certainly it needs further courage, patience, optimism and hard work. Thus, though the Permanent Court of International Justice is still only in the first decade of its existence, we must already look to over 300 separate treaties and conventions, as well as to a variety of forms of ratifications of the Optional Clause of paragraph 36 of the Statute creating the court, in order to determine the extent of its so-called "obligatory jurisdiction."

The term "obligatory jurisdiction" as currently employed means the right, resting upon prior agreement, of one nation to institute judicial proceedings against another, whether or not at the moment of controversy the defendant nation desires to be subjected to suit. The word "obligatory" is, of course, in a sense a misnomer, for the original grant of power is always voluntary, just as the original concession made by free individual citizens to governmental institutions is a voluntary one. The practical differences, however, between "obligatory jurisdiction" of a permanent judicial body and the unsatisfactory results, or lack of results, from arbitration, go to the essence of usefulness of the new World Court.

I wish now to consider the subject under three heads:

- (1) The historical development of obligatory jurisdiction of the Permanent Court of International Justice;
- (2) The present extent of the court's obligatory jurisdiction;
- (3) Some brief observations on the practical operation of obligatory jurisdiction.

I. HISTORICAL DEVELOPMENT

(1) *The Hague Conferences and Pre-War Bilateral Treaties*

You will remember that the subcommittee which dealt with the subject of obligatory jurisdiction at the 1907 Hague Conference considered some twenty-two categories of possible subjects for compulsory judicial or arbitral settlement. Taking separate votes on each category, the committee recommended only 8 of these categories as being in the judgment of the majority of the committee suitable for obligatory jurisdiction. The opposition led by the Central European Powers, however, did not prevent the adoption unanimously, except for three nations not voting, of the resolution of October 16th, "admitting the principle of compulsory arbitration" and "in declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to compulsory arbitration without any restriction."

The reason that no more practical results were achieved by The Hague Conferences both in 1899 and 1907 came, I venture to suggest, quite as much from the inherent difficulties of applying the principle of compulsory or obligatory jurisdiction to any arbitral tribunal, which by its very nature cannot ordinarily even come into existence as an actively functioning body except by voluntary agreement after the cause of action has arisen. The same inherent difficulties applied to the many bilateral treaties entered into during the years just preceding the World War, declaring that all disputes of certain kinds would in the future be settled by arbitration or other pacific means. These documents for the most part did not provide for any effective "obligatory jurisdiction," for they failed to create effective machinery to enable the complaining party to summon the other either to appear before an authoritative existing body or upon failure thereof to suffer judgment by default.

(2) *The Versailles Conference and the League Covenant*

The first plan for the organization of a League of Nations prepared by Colonel House at President Wilson's request, and which was sent to the President on July 16, 1918, about four months before the termination of hostilities in the World War, proposed the creation of an International Court with jurisdiction to (Art. 10):

determine any difference between nations which has not been settled by diplomacy, arbitration, or otherwise, and which relates to the existence, interpretation, or effect of a treaty, or which may be submitted by consent, or which relates to matters of commerce, including in such

matter, the validity or effect internationally of a statute, regulation or practice.¹

This plan obviously contemplated real obligatory jurisdiction for the proposed international court. When President Wilson came to edit this plan, he first eliminated the obligatory feature of the court proposed by Colonel House. Finally, before making any plan public at the Peace Conference, he eliminated all direct reference to any court whatever.

Neither General Smuts' plan of December 16, 1918, nor the British draft of the Covenant sent to President Wilson by Lord Robert Cecil on January 20, 1919, provide for obligatory jurisdiction. General Smuts' plan speaks of a "Court of Arbitration and Conciliation," and the British draft referred to a "Court of International Law" and to the "creation of a Permanent Court of International Justice." The plan of the Italian delegation at the Versailles Conference, which was the only official plan for a court submitted by any of the Allied and Associated Powers, did provide for "obligatory jurisdiction" in certain cases. The so-called "joint compromise plan" of the technical experts of the United States and Great Britain, which followed the plenary session of the conference of January 25, 1919, when it was decided to create the League of Nations, unfortunately permitted, as you will remember, the idea of arbitration rather than judicial settlement to predominate.

The first joint official draft of the Covenant submitted at the plenary session of the Peace Conference on February 14, 1919, failed to set up as one of its constitutional creations any permanent judicial authority. It contained a first draft of the provisions now found in Article 14, providing that the Council of the League should formulate plans for the formation of a Permanent Court of International Justice. If Article 14 of the Covenant had remained in the original form in which it was submitted to the Peace Conference on February 14, 1919, it would have resulted in a measure of general obligatory jurisdiction for the court when created. Article 14 originally read:

This Court [*i.e.*, the court to be created under plans to be formulated by the Council] shall, when established, be competent to hear and determine any matter which the parties recognize as suitable for submission to it for arbitration under the foregoing article.²

Article 13, as amended at the plenary session on April 28th, specified certain particular classes of disputes as being within the category of those which the parties agreed to be "generally suitable for submission to arbitration or judicial settlement" as follows:

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach. . . .

¹ Baker, Woodrow Wilson and World Settlement, Vol. 3, p. 83.

² *Ibid.*, p. 167.

Coincident with this amendment to Article 13, however, Article 14 was also amended, eliminating the obligatory feature which it would have imposed, and Article 14 was made to read in its present form, which is,

The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it.

This amendment had the effect of eliminating from the Covenant of the League itself any element of general obligatory jurisdiction.

(3) *The Statute Creating the Court*

The preliminary draft of the Statute creating the Permanent Court of International Justice submitted at the meeting of the Advisory Committee of Jurists in June, 1920, as well as the final draft submitted by the Advisory Committee to the Council of the League of Nations, both contained general provisions for "obligatory jurisdiction" in certain specific groups of cases, in the absence of express reservations to the contrary by signatory states. If these provisions had been accepted by the Council and Assembly of the League of Nations before submission of the protocol for signature by the various governments, the constitutional sources of "obligatory power" would have been greatly simplified. However, there was much force to the point raised by Mr. Balfour in his note submitted to the Council of the League at the meeting in October, 1920, in which he pointed out that the draft statute "goes considerably beyond the Covenant." The original error, if error it was, is attributable to the final form in which Articles 12, 13 and 14 of the Covenant were left by the Versailles Conference rather than to the amendments made by the Council of the League of Nations to the draft statute submitted by the Advisory Committee of Jurists.³ After extensive debates in both the Council and the Assembly of the League of Nations on the entire subject of "obligatory jurisdiction," both Articles 33 and 34 of the original draft of the Statute submitted by the Advisory Committee of Jurists were, as you know, modified. The Brazilian compromise resulted in the new Article 36 containing the famous Optional Clause.

While the rejection of Articles 33 and 34 of the Advisory Committee of Jurists' draft was deemed at the time a blow to the principle of obligatory jurisdiction, it seems not impossible in the light of subsequent history that it may have been a blessing in disguise. The express assignment of obligatory jurisdiction to the court through treaties and conventions has been most surprisingly rapid. The acceptance of the Optional Clause has also gone

³ At this point Mr. Peaslee interrupted the reading of his paper to state that President Scott asked to say that Mr. Scott was not a legal adviser to the commission which drafted the Covenant of the League of Nations at the Peace Conference. Mr. Peaslee added that, as he should point out later in his paper, had the Council of the League of Nations followed the advice of Mr. Scott, it would have included obligatory jurisdiction in the present Statute of the court.

forward with unexpected success. Perhaps obligatory jurisdiction of international disputes is coming about more rapidly than would have resulted if a general obligatory clause had been contained in the Covenant of the League of Nations or in the Statute creating the court; for if the nations had been required to express at once all of their reservations in order to accept the Statute at all, their exceptions might have been more sweeping and more difficult ever to abandon.

So much for a very sketchy survey of the historical background of "obligatory jurisdiction" in the present court.

II. THE PRESENT EXTENT OF THE COURT'S OBLIGATORY JURISDICTION

It is unnecessary to remind an audience such as this that the extent of "obligatory jurisdiction" of the Permanent Court of International Justice is not merely co-extensive with the ratifications of the Optional Clause in Article 36 of the Statute. There are at least three classes of sources of possible obligatory jurisdiction of the Permanent Court of International Justice as follows:

- (1) *Treaties and conventions which have expressly conferred upon the Court compulsory jurisdiction over certain categories of controversies*

The court's sixth annual report lists 312 of these which had come into force up to April 28, 1930. The number was increasing at the rate of about one for each week of the year. The officials of the court some time ago sent out a special request to governments to forward to The Hague copies of agreements, treaties and conventions which confer such jurisdiction.

Our Secretary of State's letter to the President of November 18, 1929, which led up to the signing by the United States of the two protocols for adherence to the court and the protocol for amendment of the statute, might seem upon a hasty reading to imply that the only way in which the United States can confer compulsory jurisdiction on the court in any class of cases is by adherence to the Optional Clause. It would not be correct to read the Secretary of State's letter in that way. Indeed the United States already is signatory to a number of documents which indicate a willingness to confer obligatory jurisdiction in certain cases upon the Permanent Court of International Justice at The Hague quite irrespective of ratification of the Optional Clause. That is evident, for example, from the exchange of notes at the time of signing of the treaty of June 23, 1922, at Washington between the United Kingdom and the United States relating to the renewal of an arbitration convention; the treaty of July 19, 1923, between France and the United States of America providing for the renewal of an arbitration convention, and a similar treaty of August 23, 1923, between Japan and the United States, and of September 5, 1923, between Portugal and the United States, and November 26, 1923, between Norway and the United States,

and February 13, 1924, between the Netherlands and the United States, and also at the time of the signing of the arbitration treaty of June 24, 1924, between Sweden and the United States. The collective treaty of November 8, 1927, signed at Geneva relative to import and export prohibitions and restrictions provides for compulsory jurisdiction of the Permanent Court of International Justice over controversies under it, and although the United States was not an original signer of that treaty, it has subsequently adhered to and ratified it.

Neither the signing by the United States on December 9, 1929, of the three protocols mentioned above, nor the ratifications of the three protocols by the Senate, if and when they occur, will mark the beginning of official approval by the United States of obligatory jurisdiction of the Permanent Court of International Justice in certain classes of controversies. It will also be remembered in this connection that the United States, as well as most other governments, have already consented to being sued in their own national courts of claims. Most self-respecting governments do not wish to shirk obligations which they justly owe.

When the subject of international disputes is mentioned, most of us are too prone to think only of some great political public crisis threatening a major breach of the peace. Such disputes are of almost secondary importance as compared with the thousands of claims and controversies of a business and commercial character, which should and will pass through the grist mill of international judicial institutions as they develop instead of being left to haphazard commissions or to national courts.

It is impossible within the limits of your present time or patience to go into the details of the various treaties and conventions, between three and four hundred in number, which have conferred upon the Permanent Court of International Justice obligatory jurisdiction in various classes of cases. They are manifold and far reaching. Many of them are multilateral treaties signed by a large number of nations. The so-called General Act of Geneva of 1928 is the most sweeping document within this classification. In addition to its scheme for multiplying the kinds of tribunals, it proposes with confusing modifications of language the accomplishment in another way of substantially the same result which the ratification of the Optional Clause in Section 36 of the Statute creating the court, accomplishes. However, since the General Act of Geneva of 1928 has now been ratified by several countries, including Great Britain and France, it unquestionably is a document which must be included as one of the important constitutional sources of the court's obligatory powers.

(2) *Advisory opinions as possible sources of obligatory jurisdiction*

The question whether the rendering of advisory opinions by the court might subject the United States to a certain degree of immeasurable additional compulsory jurisdiction was met and dealt with at the Conference of

Representatives of States parties to the Statute, held at Geneva from September 4 to 12, 1929.

Without trespassing on the field of Professor Jessup, may I say that it seems to me that we should face quite frankly the fact that if, as now seems to be the growing opinion, the Council of the League can without a unanimous vote call upon the court for advisory opinions, and in view of the fact that the Permanent Court in rendering an advisory opinion acts as a court and not as separate justices, the ratification of the three protocols now before the United States Senate would mean the conferring of additional possibilities of "obligatory jurisdiction" respecting controversies in which the United States might be interested, were it not for the safety valve which the new Root formula provides, giving the United States freedom to withdraw from the court without any imputation of ill-will in case the Council should persist in calling for an advisory opinion over objection by the United States.

(3) *The Optional Clause of Article 36 of the Statute*

The Optional Clause contained in Article 36 of the Statute creating the Permanent Court of International Justice permits any state, either when signing or ratifying the protocol to which the Statute is adjoined, or at a later moment, to declare that it recognizes as compulsory *ipso facto* and without special agreement, in relation to any other member or state accepting the same obligation, the jurisdiction of the court in all or in certain specified classes of legal disputes. The declaration may be made unconditionally, or on condition of reciprocity, or for a certain time. Up to the date of the issuance of the sixth annual report of the Court of International Justice of June 15, 1930, this Optional Clause had been signed by 43 states, of which 14 required ratification and had ratified and ten required ratification and had not ratified. Nineteen did not require ratification. A total of 29 states at that time were considered by the court's reporter to be then bound by the Optional Clause. Since the date of the issuance of that report of June 15, 1930, a number of additional states have ratified and/or signed the Optional Clause. According to the latest information available to me, the present number of states which are bound by the clause is 33.

Many of the states in signing the Optional Clause have exercised the right to do so upon certain conditions. Most of these conditions fall into the following classes:

- (1) Reservations respecting reciprocity and duration of time.
- (2) A condition restricting the obligatory jurisdiction to controversies arising out of "situations or facts subsequent to ratification."

This in practice will be an important reservation. It has been made by Australia, Belgium, Canada, Czechoslovakia, France, Great Britain, Germany, India, Latvia, New Zealand, Peru, South Africa and Spain.

- (3) A condition excluding disputes among members of the British Com-

monwealth of Nations. This reservation was made by all of the members of the British Commonwealth of Nations except the Irish Free State.

(4) A condition excluding cases where the parties have agreed to some other method of settlement. This is mentioned by about twenty of those which have signed the optional clause.

(5) The condition that compulsory jurisdiction should be accepted by two Powers represented on the Council. This was a condition imposed by Brazil, which has now become operative.

(6) The reservation of the right to submit the dispute first to the Council of the League of Nations. This reservation was made by Czechoslovakia, France, Italy, Peru, Great Britain, the Union of South Africa, New Zealand, India, Australia and Canada.

(7) Greece makes an exception of disputes relating to her territorial status.

(8) Finally we find a condition excepting disputes "which by international law fall exclusively within the jurisdiction" of the signatory Power. This somewhat nebulous reservation appeared first in September, 1929, in the signatures of the members of the British Commonwealth of Nations, excepting the Irish Free State. It has been adopted subsequently by Yugoslavia.

It will be remembered that under Article 36 of the Statute the Permanent Court of International Justice itself has the power to interpret the conditions and reservations imposed by any state which signed the Optional Clause, so that it will be for the court to decide in the future what this reservation means. A memorandum issued by the British Government at the time apparently interprets this reservation as not intending to do more than declare an existing principle of international law.

III. THE PRACTICAL OPERATION OF "OBLIGATORY JURISDICTION"

Sir John Fischer Williams in his very able discussion of the Optional Clause in the 1930 British Yearbook of International Law, says that "the optional clause has never yet been put into operation; there has never yet been an action brought in the Permanent Court against a signatory Power in which jurisdiction has been asserted, as a result of the clause, by one party against the opposition of the other." The accuracy of this statement, even if limited to strict acceptance of the optional clause, seems subject to some question in view of the Sino-Belgian case submitted to the court on November 25, 1926, by means of an application filed by the Belgian Government and based on the acceptance by both Belgium and China of the Optional Clause. Certainly the principle of obligatory jurisdiction, whether conferred by the Optional Clause or by special treaties, has already had a very considerable number of actual tests in the cases which have been adjudicated by the court.

The S. S. Wimbledon case, which was the first actually litigated case as

distinguished from an advisory opinion, involved the unilateral arraignment by France, Great Britain, Italy and Japan of Germany under Article 380 of the Treaty of Versailles. That article certainly conferred obligatory jurisdiction, as that phrase is generally understood, upon the Permanent Court of International Justice.

The Eastern Carelia case, though involving merely an advisory opinion, would unquestionably have subjected Soviet Russia to a measure of compulsory adjudication, if I may employ that term, with respect to its rights, and it was for the very reason that there had been no original voluntary surrender of such jurisdiction by Russia to the court that the court refused to entertain jurisdiction.

The Mavrommatis Palestine concessions case was a unilateral proceeding initiated by Greece against Great Britain. As you know, Great Britain vigorously contested the jurisdiction of the court over various aspects of the controversy.

The German-Polish Upper Silesia controversy, considered at the eighth session of the court, also was brought squarely under a provision of alleged compulsory jurisdiction of the court. The court, exercising its right to interpret the extent of its power, upheld its jurisdiction over strenuous objections by Poland.

CONCLUSION

With this necessary summary review of the present status of obligatory jurisdiction of the Permanent Court of International Justice, what general conclusions may be reached and what guide posts can be found for the future?

I revert to my opening suggestion that our great Society of Nations, which includes of course the United States of America, the Argentine Republic, the State of Russia, and all nations, whether members of the League of Nations or not, seems now to have an unfortunate multiplication of constitutional sources of power of its institutions, as well as a complexity of the institutions themselves. Anyone who has studied, however, the tortuous path of the creation of the great court which has been born in our generation at The Hague, and who has observed the almost sublime patience of those who have succeeded in constructing it upon even the imperfect constitutional foundations upon which it now rests, will hesitate long in adopting the rôle of the destructive critic.

International relations by their very nature are not simple. Let no student of the law embarking on this field of practice or academic pursuit have any misgivings as to the arduous character of the career before him. It is conceivable that some great world convention in the future, brought about by cataclysmic developments, may strike off a single, simple Constitution of the World creating completely new institutions, judicial, legislative and executive. More probable does it seem, however, that we will travel along the less simple but perhaps surer path of building on the present foundations. In any event, future historians and practitioners will certainly

look back to the documents and developments which we have been considering this morning as part of the historical or constitutional sources of the flourishing system of international courts toward which we confidently move.

In closing, I wish merely to express an apology to Miss Allen, who is to discuss this paper, because I delivered a copy of it to her only five minutes before the session opened.

The PRESIDENT. The Secretary would like to make an announcement at this point.

Secretary FINCH. I should like first to announce the membership of the Committee on Nominations, which was elected at the opening session of the Society last night: Mr. Temple, Mr. Hudson, Mr. Martin, Mr. Hackworth, and Mr. Warren.

I have been asked also to announce that the Executive Committee of the Conference of Teachers of International Law and Relations will meet in this room immediately upon the adjournment of the Society this morning.

The PRESIDENT. The discussion of Mr. Peaslee's paper will be led by Miss Eleanor Wyllys Allen, of the Bureau of International Research of Harvard University.

Miss ALLEN. Mr. President, members and friends: I was appalled to discover, at a late hour last evening, that I was supposed to be leading a discussion this morning. As a matter of fact, I had been asked to deliver a ten-minute paper on a subject upon which Mr. Peaslee was to have previously delivered a twenty-minute paper. My first thought was to get in touch with Mr. Peaslee, but I found that he was away, and was to return only at the very hour of his address.

Mr. Finch, however, was kind enough to procure for me a brief outline of Mr. Peaslee's proposed remarks, and I found that they covered every conceivable thing that could be said on the obligatory jurisdiction of the Permanent Court. Therefore, being obliged to proceed completely in the dark, I decided to outline a few of the points in regard to the optional clause, which seemed to me to be of the most interest. (Reading):

The obligatory jurisdiction of the Permanent Court of International Justice may be traced to several instruments, chief among which is the so-called Optional Clause. It is not uncommon to find Article 36 of the Statute of the court referred to as though it were this Optional Clause. Article 36, however, merely outlines the engagements to which a signatory of the clause subscribes. When the Statute was presented for acceptance by the states, there was appended, together with a section headed "A. Protocol of Signature" another under the rubric B: "Optional Clause," which read as follows:

The undersigned, being duly authorized thereto, further declare on behalf of their governments, that, from this date, they accept as compulsory, *ipso facto* and without special convention, the jurisdiction of the Court in conformity with Article 36, paragraph 2 of the Statute of the Court, under the following conditions:

This is the Optional Clause, whose importance can only be understood by an analysis of Article 36 of the Statute. Before proceeding to this analysis, however, it may be well to consider to what states this clause is open for signature. Acceptance of the Optional Clause is of course dependent upon membership in the court, and that is open as of right to "members of the League of Nations and States mentioned in the Annex to the Covenant." This formula presents no difficulties for Canada or Germany, both being members of the League, or for the United States, which is one of the "States mentioned in the Annex," but as to states once members of the League but now no longer such, complications may arise. Brazil and Costa Rica may be used as illustrations. Brazil, although not one of the signatories of the Peace Treaties, joined the League, became a member of the court and signed the Optional Clause. Under these circumstances the subsequent withdrawal of Brazil from the League would seem not to affect its obligations under the Optional Clause. Furthermore, being one of the states mentioned in the annex to the Covenant, it is not dependent upon membership in the League to be permitted to join the court and accept the Optional Clause. The case is different with Costa Rica, a state not mentioned in the annex, which was accorded admission to the League, and which while a member, took the first steps toward joining the court, and signed the Optional Clause. Before its membership in the court was perfected, however, it withdrew from the League. Hence, apparently, for Costa Rica, in contrast to Brazil, the engagement resulting from her signature of the Protocol of Signature of the Statute, and consequently that resulting from signature of the Optional Clause, has lapsed.

How do the states which may do so accept the obligations of the Optional Clause? The clause itself requires no ratification. The signatories "declare . . . that, *from this date*, they accept as compulsory . . . the jurisdiction of the Court. . . ." A state may therefore become bound merely by signing the Optional Clause. The simplest situation may be illustrated by Greece, which, having ratified the Protocol of Signature in 1921, signed the Optional Clause in 1929 and immediately became bound thereby. Nicaragua signed the Optional Clause ten days after signing the Protocol of Signature of the Court, but will not become bound thereby until ratification of the Statute takes place. Many states made their adherence expressly "subject to ratification." Provided they were already members of the court, they would become bound upon the conclusion of this self-prescribed formality. For a single state, Brazil, there was a condition precedent to be fulfilled by two members of the Council before its obligation under the clause attached.

The conditions upon which the Optional Clause was accepted varied greatly. Reciprocity, in the strict sense, was taken for granted. For by the wording of Article 36, paragraph 2, of the Statute, the signatories may "recognize as compulsory . . . *in relation to any other member or state*

accepting the same obligation" the jurisdiction of the court. This probably does not mean, however, that the obligations accepted by the two states in controversy must be identical, but rather that the obligation to accept the jurisdiction of the court is limited to the highest common factor of their several engagements. Thus, whereas the Irish Free State preferred to submit a possible dispute between itself and Great Britain to the Permanent Court of International Justice rather than to the Judicial Committee of the Privy Council, Great Britain enumerated in its exceptions disputes between members of the British Commonwealth of Nations. Should such a dispute arise involving the Irish Free State, it is obvious that the latter could not force Great Britain to submit it to the court, such submission being outside Great Britain's express commitment.

The third paragraph of Article 36 suggests something different from mere reciprocity when it says that "the declaration . . . may be made unconditionally or on condition of reciprocity on the part of several or certain members or states, or for a certain time." Brazil appears to be the only state to have adopted the suggestion embodied in the first part of this provision. It made its acceptance conditioned upon like acceptance by "two at least of the Powers permanently represented on the Council of the League of Nations." (Germany became bound on February 29, 1928, and Great Britain on February 5, 1930.)

The majority of states have placed a time-limit upon their acceptance of obligatory jurisdiction. With the exception of China, whose engagement expired May 13, 1927, these undertakings, where they have already lapsed, have been renewed.

Let us now look at the essence of the engagement. The jurisdiction of the court is recognized as obligatory concerning "the interpretation of a treaty." This is an unfortunately narrow statement, for it excludes questions concerning the *application* of a treaty. In the opinion of Sir John Fischer Williams, the court can be asked what the words of the treaty mean, but it can not be asked whether any particular fact or event does or does not fall within the language of the treaty. Incidentally, the word "treaty" must presumably be interpreted to cover "every kind of written international engagement" despite the fact that the word is used in the Covenant in a more restricted sense.

The court has jurisdiction secondly over "any questions of international law." It is not quite clear what this is intended to mean, inasmuch as we are accustomed to think of the interpretation of a treaty and reparation for a breach of an international obligation as themselves questions of international law. Possibly this phrase should be read in a narrow, abstract sense, or perhaps the two questions of international law specifically mentioned were deemed of such importance as to merit individual notice, though covered by the more general language.

"The existence of any fact which if established would constitute a breach

of an international obligation" is subject to the jurisdiction of the court. It has been suggested, on the one hand, that this phrasing covers most of the situations which have traditionally been referred to claims commissions, such, for instance, as the Alabama Claims. On the other hand, international disputes which may lead to the brink of war do not necessarily arise from breaches of international obligations; witness the Dogger Bank incident, and questions of claims to territory by discovery and occupation.

The fourth class of cases in which the court is to have obligatory jurisdiction concerns "the nature or extent of the reparation to be made for the breach of an international obligation."

It is obvious that these four categories do not exhaust the disputes properly subject to legal decision. There is a notable omission of any general obligation to submit disputes as to facts to settlement by legal process. In this regard, the Bryan Peace Treaties and the Hague Convention of 1907 conferred more far-reaching jurisdiction on the commissions established under them than does the Optional Clause upon the Permanent Court.

Not only are there innate limitations upon the obligatory jurisdiction of the court as conferred by the Optional Clause, but the latter definitely suggests that the acceptance of even these undertakings may be conditional, and Article 36 speaks of accepting the jurisdiction of the court "in *all* or *any* of the classes of legal disputes" mentioned. It seems to have been generally assumed that this phrase was tantamount to permission to make practically any reservation desired, and a large number of the states have set up reservations to suit their own particular requirements. It is significant, however, that the traditional exceptions of matters concerning "vital interests," etc., find no place among them. Such limitations would indeed be contrary to the fundamental purpose of the Optional Clause.

From what has been said, it is submitted that the superiority of the Permanent Court of International Justice over previous means for the settlement of international disputes lies not so much in the breadth of jurisdiction accorded it under the Optional Clause as in its permanent character, engendering the possibility of consistency in its decisions, and in the judicial rather than political approach to the questions submitted to it.

Professor QUINCY WRIGHT. Mr. Chairman, I was very much impressed by the care and detail with which Miss Allen went into the problem of the basis of the jurisdiction under the Optional Clause. There was one minor point which I thought might be subject to further discussion. As I understood Miss Allen, she suggested that for states which had ratified the protocol, the Optional Clause might be acceded to by signature without ratification; and I understood she drew that from the statement that the Optional Clause went into effect immediately upon the date of signature. I should like to submit that the question of the procedure by which a state can definitively become a party to that instrument is a matter for its own constitutional law. The party which signs is the state. If the government should sign an

instrument beyond the constitutional power which the state has accorded it, I submit that the state would not be bound by that signature.

I refer to this because obviously it might be a matter of some importance in the case of the United States. It would seem to me that, the United States, having become a party to the court, if the President authorized signature of the Optional Clause, that would not mean that the United States had become a party to that clause; because under our Constitution that type of instrument is one to which the United States can become a party only through the President acting with the advice and consent of the Senate. Thus, if the President signed alone, I believe his action would be nugatory. The statement in the instrument itself that it comes into effect immediately on signature cannot modify that fact. Presumably in the case of the United States the appropriate procedure would be for the President to get the advice and consent of the Senate before he signed at all. If he did that, of course the signature would then become definitive; but if he signed without such authority from the Senate, it seems to me the United States would not be bound.

The PRESIDENT. Is it the desire of the Society to discuss further the paper at this stage of the proceedings?

(A member suggested that Professor Jessup's paper be heard first, and then that the discussion be proceeded with.)

The PRESIDENT. That would seem to be the ordinary course of procedure.

THE ROOT FORMULA FOR THE ACCESSION OF THE UNITED STATES TO THE PERMANENT COURT OF INTERNATIONAL JUSTICE

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The question of the accession of the United States to the Permanent Court of International Justice, may be considered of so perennial a nature as to make its inclusion appropriate to a meeting celebrating the 25th anniversary of this Society. It is perhaps not too much to hope that this question will not need to be on the program of the 50th anniversary.

At the first meeting of this Society there was some discussion of the agenda of the then approaching Second Hague Conference. The question of arbitration was touched upon by such distinguished speakers as John W. Foster, Theodore S. Woolsey and John Bassett Moore. It is interesting to note that Professor Moore then advocated "changing the constitution and enlarging the powers of the Permanent Court of The Hague so as to make it a permanent tribunal, always in session, and with effective jurisdiction as regards certain classes of questions."¹

¹ Proceedings of the American Society of International Law, 1907, p. 259.

It is scarcely necessary or appropriate on this occasion to review the history of the negotiations leading up to the embodiment of the so-called "Root Formula" in the treaty which is now commonly known as the Protocol of Accession. In the time available, I shall confine myself to a discussion of certain aspects of the interpretation of that protocol.

The fundamental question raised by a technical discussion of the interpretation of the Protocol of Accession is whether that protocol constitutes an acceptance of the five reservations adopted by the Senate in its resolution of January 27, 1926. The preliminary reply to this question is found in the language of the preamble and Article I of the protocol. These two portions of the protocol read as follows:

The states signatories of the Protocol of Signature of the Statute of the Permanent Court of International Justice, dated December 16, 1920, and the United States of America, through the undersigned duly authorized representatives, have mutually agreed upon the following provisions regarding the adherence of the United States of America to the said Protocol, subject to the five reservations formulated by the United States in the resolution adopted by the Senate on January 27, 1926.

Art. I. The states signatories of the said Protocol accept the special conditions attached by the United States in the five reservations mentioned above to its adherence to the said Protocol upon the terms and conditions set out in the following articles.

The preamble thus clearly indicates that the protocol is intended to provide for the adherence of the United States, not on some new basis, but "subject to the five reservations." Article I carries forward this purpose by setting forth an acceptance of the "special conditions attached by the United States in the five reservations." This acceptance is qualified by the ensuing phrase "upon the terms and conditions set out in the following articles."

An examination of the protocol reveals a total absence of any mention of the first and third reservations of the Senate; these reservations referred to the relations of the United States to the League and to the payment of a share of the court's expenses by the United States. The reason for omitting all reference to these reservations is that there was no desire to attach to their acceptance any "terms and conditions." Since the preamble and Article I clearly contemplate an acceptance of all five reservations, it seems to be indisputable that reservations 1 and 3 are unqualifiedly accepted. The theory underlying the whole protocol is that one starts with an acceptance of the five reservations and that this acceptance is qualified only in so far as the protocol contains "terms and conditions" applicable to particular reservations.

Since there is little current discussion of the acceptance of the second reservation, of the last half of the fourth reservation and of the first part of the fifth reservation, I shall not touch here upon the particular terms and conditions inserted in the protocol with respect thereto, except to say that

the terms and conditions are largely to the advantage of the United States or are beyond the reach of even the most captious criticism.

The first part of the fourth reservation provides "That the United States may at any time withdraw its adherence to the said Protocol." At the Conference of Signatory States which met in Geneva in September, 1926, it was suggested that this provision should be made reciprocal by according a similar right of withdrawal to the other states. It would, of course, be most unusual to find a treaty which contained a provision permitting the withdrawal of one party but not permitting the withdrawal of the other party. The Protocol of Accession, following the suggestion of the Final Act of the 1926 Conference of Signatory States, provides in its eighth article for this reciprocal right of withdrawal.² As Mr. Root pointed out in his testimony before the Senate Committee on Foreign Relations on January 21, 1931, the inclusion of this provision makes the protocol an agreement terminable at will by either party.³ This is a very common provision in treaties, and Mr. Root pointed out that the United States has concluded some 400 treaties containing such provisions. He also pointed out that the object of including withdrawal provisions in treaties is to put an end to controversies, and that "experience has shown that such is the effect of acting upon them."

Bearing in mind, therefore, the basic underlying acceptance of all five reservations and the provision making the protocol an agreement terminable at will, we may turn to the consideration of the second part of the fifth reservation, upon which most of the public discussion has been focused.⁴ The "terms and conditions" relative to this second part of the fifth reservation are found in Article 5 of the Protocol of Accession. In order to give further emphasis to the contracting parties' acceptance of the reservation, this article of the protocol begins with a phrase which is taken word for word from the reservation. It reads as follows: "With a view to ensuring that the Court shall not, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest," Then follows the procedure provided for ensuring this result.

It has sometimes been asked why, if the signatory states were willing to accept the fifth reservation, they did not plainly say so in a few words without encumbering their acceptance with the procedural provisions contained in the protocol.

² For the proceedings of the 1926 Conference, see League Doc. V. Legal. 1926. V. 26. For the Final Act and Protocol of 1926, see Appendix, *infra*, pp. 264, 268.

³ See World Court, Hearing Before the Committee on Foreign Relations United States Senate, Seventy-first Congress, Third Session, relative to Protocols concerning adherence of the United States to the Court of International Justice, Jan. 21, 1931, p. 44. This document is hereafter referred to as "Root Hearing."

⁴ The second part of the fifth reservation reads as follows: ". . . nor shall it [the Court], without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest."

Without discussing this point in detail, it may be recalled that at the 1926 Conference of Signatory States there was considerable uncertainty as to the interpretation of the fifth reservation and as to the manner in which it would be invoked and applied. Frequently, states are willing to accept a certain treaty rule when the method of its application is agreed upon in advance, although they are not willing to accept the same rule without such a previous understanding. Perhaps it is sufficient to note that the signatory states were unwilling to accept the fifth reservation without this procedural arrangement, but that they are willing to accept it with this arrangement.

A fundamental point to be kept in mind in considering the acceptance of the fifth reservation through Article 5 of the protocol, is the distinction between the body which requests advisory opinions and the body which entertains the request and renders the opinion. "The second part of the fifth reservation relates solely to the jurisdiction of the court. . . . It is purely statutory in form and its incidence is upon the court alone. It does not impose any prohibition or command upon anyone who may request advisory opinions or who may be interested in them."⁵ On the other hand, the Protocol of Accession, in this connection, is directed, not to the court, but to the Council.

The wording of Article 5 of the Protocol of Accession must be searched for terms and conditions varying the acceptance of the fifth reservation. The acceptance of the fifth reservation preserves the bar to the court's jurisdiction and prohibits the court from entertaining a request for an opinion without the consent of the United States if an interest of the United States is affected. Does the Protocol of Accession raise this bar and permit the court to proceed without the consent of the United States?

The first paragraph of Article 5 of the protocol provides for an exchange of views between the United States and the Council or the Assembly of the League as to whether an interest of the United States is affected. Surely, there is nothing here which raises the bar to the court's jurisdiction.

The second paragraph of Article 5 of the protocol provides for a similar exchange of views in a particular case. It was realized that, in certain situations, a request for an advisory opinion might be transmitted to the court before there had been an opportunity for the exchange of views. This paragraph provides that in such a situation the proceedings before the court "shall be stayed for a period sufficient to enable such an exchange of views between the Council or the Assembly and the United States to take place." Rather than raising the bar to the court's jurisdiction, this paragraph provides for an additional stay in cases where there has been no opportunity to ascertain whether the request for the opinion affects an interest of the United States. There is nothing to indicate that this temporary stay is in lieu of rather than in addition to the bar set up by the fifth reservation.

The third paragraph of Article 5 of the protocol also provides an additional safeguard for the United States by including a provision suggested in

⁵ Root Hearing, p. 45.

the Final Act of the 1926 Conference. This paragraph states that "with regard to *requesting* an advisory opinion of the Court in any case covered by the preceding paragraphs, there shall be attributed to an objection of the United States the same force and effect as attaches to a vote against asking for the opinion given by a member of the League of Nations in the Council or in the Assembly."

Here again, is a provision addressed to the Council which requests the opinion rather than to the court which gives the opinion. In the exchange of views provided for in the preceding paragraphs, the United States might dissuade the Council from requesting an opinion. By virtue of this third paragraph the persuasion of the United States is fortified by the weight attributed to its vote. You will recall the arguments relative to the necessity for a unanimous vote in requesting advisory opinions. This controversy has not yet been settled. The practice has been and apparently still is, to require unanimity, and so long as that practice continues the United States has a veto power over the request for an opinion in addition to its "veto power" over the court. It seems obvious that the granting of this power in the Council (or Assembly) is not inconsistent with or a modification of the acceptance of the fifth reservation.

The fourth paragraph of Article 5 of the Protocol of Accession contains an indication of the essential philosophy upon which the whole protocol is based, and it has been the cause of some disagreement. It reads as follows: "If, after the exchange of views provided for in pars. 1 and 2 of this article, it shall appear that no agreement can be reached and the United States is not prepared to forego its objection, the exercise of the powers of withdrawal provided for in Art. 8 hereof will follow naturally without any imputation of unfriendliness or unwillingness to cooperate generally for peace and good will."

The true purpose and intent of the "Root Formula" as embodied in the Protocol of Accession was clearly explained by Mr. Root to the Senate Committee on Foreign Relations. The theory is, that, as a matter of practical reality, a fair and frank exchange of views between the United States and the Council will, in all probability result in an adjustment of any difference of opinion. It is scarcely conceivable that some formula for agreement would not be found. Nevertheless, to cover even the most unlikely contingency, provision is made for the case of disagreement. If there should be disagreement, it would be evident that the arrangement, contrary to the belief of the signatories, was "not yielding satisfactory results" and that this procedure for cooperation in the cause of international judicial settlement would not work. If such should be the case, it would be to the advantage of all parties to terminate the agreement.

It must be remembered that the provision for withdrawal was originally stipulated in the fourth reservation and is confirmed in Article 8 of the Protocol of Accession, with the addition of the reciprocal right of withdrawal to which attention has already been called. The mention in Article 5 of the

protocol of the right to withdraw is merely a factual statement pointing to one situation in which it would be natural for the parties to exercise this right. The situation was thus stated by Mr. Root to the Senate Committee:

There is every reason to believe that there would be entire and easy agreement between the Council and the United States. The question for discussion in each case will be very simple. Under the terms of the fifth reservation the Council will still have the legal right to request an opinion and the United States will have the legal right to interpose before the court an objection based upon a claim of interest and refusal to consent. But in an agreement terminable at will the exercise of those powers must be reasonable and considerate and free from subterfuge or concealment of motives, or the agreement will certainly come to a speedy end.

Observance of this consideration will indicate to both parties that if the question affects an interest of the United States it can not wisely be asked, although the Council has power to ask it, and that if the question does not affect an interest of the United States, a claim of interest can not wisely be interposed, although the United States had power to interpose it.

Both parties will wish to reach a common understanding as to the nature and effect of each question as it arises, because the continuance of the agreement is in the interest of each.⁶

There is nothing in this paragraph of the protocol which raises the bar to the jurisdiction of the court. The bar to the court's jurisdiction and the right to withdraw were separately stipulated in the Senate reservations and constituted alternative lines of action. The same relationship between the two provisions is retained in the Protocol of Accession. There is no duty laid upon either the United States or upon the other signatory states to exercise the right of withdrawal. If the United States does not choose to exercise its right to withdraw in such a situation, the court is still without jurisdiction to entertain the request. However, if the other states choose in such a contingency to exercise their right of withdrawal, the protocol will be terminated and will have no more validity. The situation would then be exactly that which exists today; the signatory states would be parties to a treaty which contained no detailed provision regarding the rights of the United States; the court would be free to entertain requests for advisory opinions when they were transmitted to it by the Council; the United States as an "outside" state would have no right to object or to interfere. It is a proposition so clear as to require no argument, that a reservation to a treaty can not outlast the life of the treaty to which it is attached. Naturally, the reservation passes out of the picture when the treaty incorporating it passes out of the picture.

If the signatory states had expressed a willingness flatly to accept the five reservations on the sole condition that the right of withdrawal be made reciprocal, is it conceivable that so reasonable a proposition would have been

⁶ Root Hearing, p. 47.

rejected by the United States? If such a proposal would have been accepted, by the same token the present Protocol of Accession may be accepted, since acceptance of the condition that the right of withdrawal be made reciprocal is the only substantial difference between the Protocol of Accession and an acceptance of the five reservations by a simple affirmative.

Current discussions of the Protocol of Accession have, perhaps, attached undue importance to Article 68 of the Protocol for the Revision of the Statute.⁷ In the time available, it is impossible for me to discuss this question. It may be pointed out, however, that if it be true that the Protocol of Accession constitutes an acceptance of the five reservations, the particular interests of the United States do not require concern for the interpretation of Article 68. It may well be that the adoption of Article 68 would be beneficial to the court and to other states which are parties to the treaty establishing the court; the effect of the adoption of Article 68 would be to extend to other states the guarantee which the United States secures through the Protocol of Accession, at least in so far as disputes to which a state is a party are concerned.

In respect of the court, the decision in the Eastern Carelia case, backed by the history of the events leading up to the final adoption of Article 68, gives sufficient assurance that the jurisprudence of the court in this particular will not be altered. In respect of the other states, it is not apparent why the United States should be exercised over a danger which those states themselves do not fear. The Protocol of Accession alone is the complete acceptance of the Senate reservations.

The PRESIDENT. The discussion of this paper will be begun by Mr. Howard T. Kingsbury, of the New York Bar.

Mr. KINGSBURY. Mr. President, ladies and gentlemen of the Society (reading). It has been a privilege to hear Professor Jessup's admirable exposition of the present status of the Protocol for American adherence to the World Court and his lucid explanation of its legal effect. Only one who had been so closely associated as he with the work of Senator Root in this crowning achievement of the Senator's great career could be in a position to set forth the whole matter so clearly.

It is evident from the discussions of the matter in the public press and from what was said at the hearing in January before the Senate Committee on Foreign Relations that there has been great misapprehension as to the effect of the protocol on the power of the United States to prevent the rendering by the World Court of the advisory opinion upon a question in which the United States has or even claims an interest. Professor Jessup has made it clear to us, as I hope Senator Root made it clear to the Senate Committee,

⁷ Compare for example Root Hearing, p. 25, and Secretary Stimson's letter of Nov. 18, 1929 to the President, *ibid.*, pp. 52, and Supplement to AMERICAN JOURNAL OF INTERNATIONAL LAW, January, 1931 (Vol. 25), p. 50.

that the protocol does not in any way emasculate the Senate reservations; he has made it clear that if the United States becomes and remains an adherent to the court under the reservations and the protocol, it has a complete veto power against an advisory opinion in any case in which it has or claims an interest, and that a withdrawal by the United States from its adherence to the court would only be for the purpose of avoiding an occasion to exercise its veto power.

This, perhaps, might be made even more clear by outlining in the simplest way the possible proceedings in a case that might arise after American adherence. A question might develop, let us say, between Canada and some European Power. This might be of such a nature that an advisory opinion was desired rather than the submission of a controversy. By reason of Canada's geographical proximity to the United States this country might have an interest in the question. A proposal is made in the Council of the League of Nations that an advisory opinion be requested. The United States is informed through the Secretary General of the League; the exchange of views follows and the United States objects to the request. This objection under existing practice will be sufficient to act as a veto. In the improbable event that this veto should not be recognized, the United States may then stand upon its objection or forego it or withdraw from its adherence to the court. If it stands upon its objection and does not withdraw from its adherence and the request for an advisory opinion is nevertheless made, there will be a notification to the United States from the registrar of the court and a further opportunity for an exchange of views. Here, again, if the United States insists upon its objection, this will, under existing practice, act as a veto upon the court just as the former objection should act as a veto upon the Council. If the court should change its practice and entertain the request for the advisory opinion, the United States will have a further opportunity to withdraw from its adherence if it so desires.

It seems hardly conceivable that, after the exchange of views provided for, either the Council of the League or the court would undertake to disregard a veto by the United States in any matter in which the United States had any real interest, or that the United States would unreasonably press an objection in a matter in which it had no real interest. However, in politics and with politicians nothing is impossible, since so many politicians seem to be afflicted with what I believe the theologians call "invincible ignorance." It is apparently an actual or assumed fear of the remote possibility of an arbitrary disregard of a reasonable objection by the United States that constitutes the last line of defense of the opponents of American adherence to the court. Such adherence would at least be a "noble experiment" and one more consistent with American traditions than certain other "noble experiments" which this country has undertaken.

There is one point which, it seems to me, is left somewhat obscure both by Professor Jessup's paper and by the statements made by Senator Root

before the Senate committee, and upon this I should like to address an inquiry to Professor Jessup. It is this: To make the protocol binding requires ratification by the United States and by all of the states which ratified the protocol of December 16, 1920. (See Article VII of protocol.) By Article VIII it is provided that the protocol shall cease to be in force upon the withdrawal of American adherence or upon withdrawal of their acceptance by not less than two-thirds of the other contracting states. The other states, however, are apparently to withdraw individually and not collectively. There appears to be no provision determining or explaining the situation in the event that a number of states, but less than two-thirds, should withdraw their acceptances. In such event would the withdrawing states remain bound by the protocol until the necessary two-thirds had withdrawn, or as between themselves and the United States would they cease to be adherents to the court, or what would be their status? This might become of importance in the event of a justiciable question arising as between the United States and one or more of such withdrawing states, or in the event of a proposal of some amendment of the Statute of the court. I hope that Professor Jessup can and will elucidate this point.

In pointing out this difficulty, I do so, not as an objection, but in the hope of clearing up a possible objection by opponents of American adherence. My own personal view has been from the beginning that the United States should have adhered to the court without that portion of the fifth reservation which has given rise to all the difficulty.

THE PRESIDENT. The second contribution at this stage of the proceedings will be made by Mr. Thomas R. White, of the Philadelphia Bar.

MR. WHITE. Professor Jessup was kind enough to send me a copy of his paper several weeks ago; and as I do not agree entirely with his construction of the protocol, I have prepared an answer or a comment upon it in writing. (Reading):

I agree with the conclusions stated in Professor Jessup's admirable address, that American public opinion is favorable to our adherence to the World Court treaty, and that the terms of the protocol now before the Senate adequately protect the interests of the United States. I do not, however, agree entirely with Mr. Jessup's interpretation of the Protocol of Accession.

The question at issue is, of course, whether the Protocol of Accession includes an unconditional acceptance of the second part of the fifth reservation, so that if said protocol becomes a binding treaty, it will deprive the World Court of power to render an advisory opinion against the objection of the United States, upon any question in which the United States claims an interest. Mr. Jessup concludes that the protocol does or will have this effect. He bases his argument upon certain clauses of the protocol which deserve careful scrutiny.

Article 1 provides:

The states signatory of the said protocol accept the special conditions attached by the United States in the five reservations mentioned above to its adherence to the said protocol, upon the terms and conditions set out in the following articles.

This article, it is contended, is an acceptance of the five reservations, and nothing that follows in the text of the protocol nullifies or weakens this acceptance. It must be admitted that under ordinary rules of construction, if one article of a contract imports an acceptance of a proposition "upon the terms and conditions set out in the following articles," we are not warranted in assuming an unqualified acceptance of the proposition, but must look to the "following articles" to see whether the "acceptance" is modified or hedged about by conditions. This rule would apply to a treaty as to any other contract, and I do not understand Mr. Jessup to question it. We must, therefore, examine the "following articles" to ascertain upon what "terms and conditions" the five reservations are accepted.

As Mr. Jessup correctly says, Article 5 is the only following article dealing with the point at issue, and therefore it alone need be examined. We may lay aside, at least temporarily, the opening phrase, as it is admittedly introductory only and does not purport to be a binding term of the protocol. Then come the following provisions in this order:

1. If any proposal for obtaining an advisory opinion from the court is laid before the Council or Assembly of the League of Nations, the Secretary General shall immediately inform the United States.

2. If desired, there shall be an exchange of views as to whether an interest of the United States is affected.

3. When the court receives a request for an advisory opinion, its registrar shall notify the United States and a time-limit shall be fixed within which a written statement will be received from the United States.

4. If for any reason there has not been sufficient opportunity for an exchange of views, and the United States advises the court that the question upon which the opinion of the court is asked affects the interests of the United States, the proceedings shall be stayed for a period sufficient to enable such exchange of views to take place.

5. When the question is pending as to whether an advisory opinion shall be asked for by the Council or Assembly of the League of Nations, an objection by the United States shall have the same force and effect as an objection by any other state.

6. If after such exchange of views as above mentioned, the United States is not prepared to forego its objection, the right of withdrawal from the court treaty may be exercised without any imputation of unfriendliness.

These are the provisions of Article 5. Do they import an unconditional acceptance of the second part of the fifth reservation, so that upon objection by the United States, the court is powerless to render an opinion upon a question in which the United States claims an interest, or do they mean

merely that every opportunity will be given the United States to present its objection, that its objection shall have the same force and effect as that of any other nation, but that if this is insufficient and its objection cannot be argued away or overcome, then the United States may withdraw from the treaty without any imputation of unfriendliness, but cannot prevent the court from rendering the opinion.

I respectfully submit the following observations as sustaining the latter view.

1. The first four provisions of Article 5 above mentioned are designed solely to afford the United States full opportunity to present its objections, if it has any, to a request for an advisory opinion, or to the rendering of the same. Then follows the only provision in the protocol as to the effect such an objection shall have, and this is that it shall have the same effect as that of any other nation, on the question whether an advisory opinion shall be requested. This, it is conceded, is not a right of veto.

A question which naturally suggests itself is, if it were intended that an objection by the United States should be a bar to the court's jurisdiction, why was it not so provided? Why insert a provision that an objection by the United States to a proposed request for an advisory opinion shall have only the same force and effect as that of any other nation, if it were intended that the United States should have what no other nation has, an absolute veto on the court's exercise of jurisdiction? Why confer upon the United States a qualified right to interfere with a request by Council or Assembly, if it has an absolute right to nullify any request that could be made by either?

I cannot subscribe to the view that the silence of the protocol upon the force and effect of an objection by the United States to the court's jurisdiction as distinguished from an objection to a request for an opinion should be construed to be an unqualified acceptance of the fifth reservation. Upon all accepted rules of construction with which I am familiar, the terms of the article in question lead to the opposite conclusion. There would be little point in an objection by the United States to a request for an opinion, and none at all in a request being made by the Council or Assembly over an objection by the United States, if such objection were an absolute bar to the court's jurisdiction.

2. The terms of the final clause of this article greatly strengthen, if they do not render certain, this construction. If after the exchange of views provided for, the objection of the United States cannot be overcome, the powers of withdrawal from the treaty may be exercised without any imputation of unfriendliness. Why this provision, if the United States has the absolute right under these circumstances to prevent the court from rendering an opinion? If it has such right, why does the protocol not provide that if the United States is not prepared to forego its objection, the court shall render no opinion on the question?

I can see no logical reason for any reference at this point to the right of friendly withdrawal, if the protocol was not intended to offer this as a way out, when the United States would not forego its objection but could not prevent the court from acting. If the United States by remaining a party to the court treaty could prevent the rendering of an advisory opinion by the court, which, in the judgment of the United States, would be detrimental to its interests, would it not be its duty to remain a party to the treaty and thus prevent the rendering of the opinion? Why, in such a case, should it withdraw? Why, therefore, should the right of withdrawal be mentioned in this connection if the United States would have the power claimed?

I am unable to escape the conclusion that this provision of the protocol was intended to enable the United States to restore the *status quo ante*, without any imputation of unfriendliness, in cases where its objection was adhered to but not effective, and thus to make it clear that by joining the court the United States does not really place its interests in jeopardy.

A consideration of the history of this matter and the minutes of the Committee of Jurists which framed the protocol confirms me in the view I have expressed. The objection to the acceptance of the fifth reservation as set forth in the resolution adopted by the United States Senate in 1926 was based on the fact that it clearly provided that the court could not, without the consent of the United States, "entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest."

In the 1926 draft protocol, which proved unacceptable to the United States Senate, this clause was omitted entirely, but the objection of the United States was given the same force and effect as the negative vote of any other state when it was proposed in the Council or the Assembly that an advisory opinion should be requested. It is interesting to note that this protocol, unlike the pending one, provided that the *court*, not the Council or Assembly, should give such effect to the objection of the United States.

In Mr. Root's suggested redraft of Article 4 of the protocol of 1926, which was laid before the Committee of Jurists at Geneva in 1929, it was specifically provided that "the Court shall not, without the consent of the United States, render an advisory opinion touching any dispute to which the United States is not a party but in which it claims an interest or touching any questions other than a dispute in which the United States claims an interest."¹

In a suggested draft submitted by M. Pilotti, two alternative courses were suggested, either (1) that the objection of the United States should have the same force and effect upon the *court* as an objection presented by a member of the League of Nations, either in the Assembly or in the Council, against asking for an opinion; or (2) that the question whether the United

¹ Minutes of Committee of Jurists, p. 9; reprinted herein, *infra*, p. 277. For the draft protocol of 1926, see *infra*, p. 268.

States really had an interest should be submitted to the court for decision, and if found to be so, the opinion could not be given without the consent of the United States.²

It will be observed that neither of these alternative courses goes to the extent of giving the United States a veto against the rendering of an opinion upon a matter in which it claims an interest.

A third redraft was later laid before the committee by Sir Cecil Hurst, which, so far as regards this point, was substantially identical in language with the final draft.³ The debate before the committee indicates clearly that it was not understood that Sir Cecil Hurst's draft carried out fully Mr. Root's original proposals. Thus, the chairman, M. Scialoja, said:

According to Mr. Root's proposals, whatever might be the nature of the dispute giving rise to a request for an advisory opinion, the United States reserved to itself the right to prevent any request being made for an opinion or to withdraw. The United States would thus have a right which was more extensive than that embodied in the draft of Sir Cecil Hurst, namely, the right to veto a request for an advisory opinion, whatever might be the size of the minority. If that interpretation were false, he would be delighted, as it would signify that the United States renounced its demand, at least in certain cases, but he did not think this was so.⁴

M. Politis said:

Sir Cecil Hurst, in his proposal, achieved the same result, in fact, as if the United States were a member of the Council. If unanimity were necessary, the veto of the United States would suffice to prevent the request for an opinion being made. If a majority sufficed, the negative vote of the United States would be inoperative.⁵

The chairman, in the course of debate, said further:

According to the proposal of Sir Cecil Hurst, the United States of America would have the right to veto a request made to the Court for an advisory opinion, if unanimity were necessary for such a request. The Chairman had made a similar proposal at the previous meeting but it had been rejected by the Committee because the members had felt that the possibility should be left open for the Council or the Assembly to submit a request for an advisory opinion which had not been adopted unanimously but only by a majority. In the latter case, however, the vote of the Government of the United States of America could not prevent the Assembly or the Council from making such a request. If the representative of the United States were satisfied with this solution, the Committee itself might rest content; but the Chairman did not think this was the case. To assimilate the position of the United States to that of a Member of the League of Nations in cases where a request for an opinion was adopted by a majority vote would not, he thought, satisfy the desires of that country, which really wished to be

² Minutes of Committee of Jurists, p. 10; *infra*, p. 279.

³ *Ibid.*, p. 16; *infra*, p. 290. ⁴ *Ibid.*, p. 18; *infra*, p. 294. ⁵ *Ibid.*, p. 19; *infra*, p. 295.

able in certain cases to veto recourse to the Court even when such recourse had been voted by the majority. This point, he thought, should be made clear.⁶

Immediately following this statement by the chairman, M. van Eysinga made the following remarks:

There might be a section of public opinion in America which desired to claim the right of veto in cases where a request for an advisory opinion had not been unanimous. The Committee now learned that the United States would be content if it were allowed to withdraw in such circumstances. This being so, M. van Eysinga urged the adoption of the second paragraph of Sir Cecil Hurst's proposal.⁷

This is a very clear statement that it was the understanding of the speaker that the United States would be content without being given an absolute veto, if it were given the right to withdraw. There was no dissent from this statement, although, as it appears from the minutes, all the members of the committee were present.

In view of the fact that Sir Cecil Hurst's draft, which was then before the committee, was incorporated in the final draft of the protocol without substantial change, it is reasonable to conclude that the committee was of opinion that the terms of this proposal did not give the United States an absolute veto in the event that a unanimous vote was not required to request an advisory opinion, but that in such case it would be content with its right to withdraw without the imputation of doing an unfriendly act.

There are other portions of these minutes which it may be thought have a bearing upon the question under discussion, but none which appear to me to alter the view thus expressed, as to the understanding of the members of the committee. While, of course, it must be recognized that the debates of a body framing a statute or a treaty are not to be given controlling force in interpreting the final form of the statute or treaty, nevertheless they are of weight in determining what was intended by the language used, and in this case they clearly sustain the view I have expressed.

The omission in the pending protocol of the definite provision contained both in the fifth reservation and in Mr. Root's revision of the 1926 protocol, that the United States should have an absolute veto in any case where it claimed an interest in the question upon which it was proposed to request an advisory opinion, cannot be overlooked. It would in my opinion not be reasonable to hold that the protocol with this provision omitted was intended to mean the same as it did before said provision was stricken out, merely because of the general language of Article 1.

But, in any case, it would be of doubtful wisdom to ratify a treaty upon a theory of its meaning so open to question as this certainly is. The friends of ratification will be on safer ground if they take the position so well stated

⁶ Minutes of Committee of Jurists, p. 20; *infra*, p. 298.

⁷ *Ibid.*, p. 20, *infra*, p. 298.

by Mr. Jessup, that the interests of the United States are adequately protected by the Protocol of Accession, even though it has no absolute veto, because in the improbable event of its objection being unavailing it can, without any imputation of unfriendliness, always restore the *status quo ante*.

The PRESIDENT. The discussion is now open for debate. Professor Jessup is recognized.

Professor JESSUP. Have I the privilege of counter-comment, Mr. President?

The PRESIDENT. This is a forum of free expression.

Professor JESSUP. I should hesitate to enter into a dispute with Mr. White on a question of legal construction; but he did pass from the question of construction of the document to what I suppose is legally quite proper; namely, to an assumption of the intention of the parties to be derived from that construction. Without entering into the question as to whether it is good legal evidence, I hope I may say a word in regard to what I think I can assure you was the intent of the draftsman, and, I believe, of the other members of the committee.

The view which I attempted to express in regard to the intention contained in the acceptance phrase of Article 1 was the expressed intention of Mr. Root in drafting his protocol. He stated it ten days before he reached Geneva and submitted his draft. He stated it to people there, and repeatedly throughout the negotiations. When Sir Cecil Hurst, in the course of the discussions of the committee, submitted to him an alternate draft, Mr. Root examined it with great care, and came to the conclusion that it expressed essentially all that he wished to express in his original draft.

I think that Mr. White perhaps went too far in his construction of Article 1. It seemed to me that he left out entirely the phrase "accept the special conditions", and dwelt entirely upon the "terms and conditions." In regard to that, I wonder whether Mr. White agrees that the two reservations which are not mentioned at all in the protocol are accepted; or do you think that Reservations 1 and 3 are not accepted by the Protocol of Accession?

Mr. WHITE. I think they would be accepted. There are no terms and conditions with regard to them.

Professor JESSUP. In other words, you would agree that there is a basic acceptance, and that that acceptance is varied only by the terms and conditions set forth in the protocol?

Mr. WHITE. I think that is right.

Professor JESSUP. It seemed to me that Mr. White agreed with that in the beginning of his remarks, but ended by departing from that and emphasizing only the terms and conditions, and not the acceptance. I think I may repeat that the intention was that that basic acceptance meant that you began reading the protocol by this phrase: "The signatory states agree, subject to the procedure which follows, that the court shall not,

without the consent of the United States, entertain a request for an advisory opinion." I think that is a correct description of the intention of the parties.

In regard to the debates in the committee, I should like to say just this: As a matter of fact, the chairman presiding at the time of the meeting from which you quoted was, I believe it is fair to say, very much interested in or believed it would be desirable to bring out the question of the unanimity rule in the Council in regard to requesting advisory opinions; and I believe that those minutes, those debates from which you quoted, Mr. White, in their setting, related fundamentally to the question which was raised at the Conference of Signatories in 1926; namely, the supposed intention of the United States to get equality of voting-power in the Council. There was a desire to force a determination of this question of the need for unanimity; it was in that point that the Europeans were particularly interested, and it was to that point that they were speaking. This fundamental difference between the rights of the United States in the Council, on the one hand, and before the court on the other hand, was not directly at issue in those passages from which you quoted.

The United States, or rather the Root formula, did not demand a veto power in the Council, because it did not demand the perpetuity of the unanimity rule. That was an extra thing provided in the 1926 protocol, and therefore incorporated in the Root protocol. But Mr. Root had no intention of standing on that; and, as appears from his testimony before the Senate committee, he said, that he thought "it was very unlikely that we should want to exercise our right in the Council, because we stand on our bar against the jurisdiction of the court." I might add that it is not properly a veto in the court, and that references to a veto are not applicable to the discussion of the court. It is merely a bar to the jurisdiction of the court.

I want to say just one other word. I freely confess, after hearing Mr. White's remarks, that I utterly failed in my attempt to explain the underlying philosophy of the plan. Mr. Root's theory, I think, was this, that it was necessary, in view of the attitude taken by the European statesmen in 1926, to have some procedure relative to the application of the fifth reservation. You will remember that in 1926 they were concerned for fear that the Council would transmit a request to the court, and then, as it were, be met by a slap in the face in the form of an objection of the United States. They wanted to be assured that they could find out the attitude of the United States before the matter went to the court.

Furthermore, I think Mr. White overlooks the point that the purpose of the exchange of views is not to determine whether a request shall be submitted to the court. It is to find out, in the language of the protocol, whether an interest of the United States is affected; the underlying assumption being that if it is affected, the court may not proceed without the consent of the United States; and the whole idea of this procedure was that it will probably work. When you have this frank discussion, you probably

will reach agreement. If you do not—and here, I think, the language of Mr. Root's original draft is more descriptive and more illuminating than the final condensed texts—if you do not reach agreement, it will show that, due to a fundamental divergence of opinion as to the proper scope of the procedure involving advisory opinions, this protocol does not work; that we cannot see eye to eye; that we cannot reach agreement, and therefore we should withdraw. We should withdraw, not because of the particular issue which the Council contemplates submitting to the court, but should withdraw because there has been revealed a fundamental inability to coöperate under the plan suggested.

If I may also while I am on my feet, return to the question suggested by Mr. Kingsbury, I think that that is answered by the language of the protocol itself. In other words, this protocol is designed in a sense to be a bipartite rather than a multipartite contract between the United States, as one party, and the signatory states as another. The second paragraph of Article 8 of the protocol says that the effect of the notice of the United States is that the present protocol shall cease to be in force. In regard to the exercise of the power of withdrawal by the other composite party to the protocol, the parties agree that their means of giving notice of this is by a two-thirds vote; and the protocol further provides that the protocol shall cease to be in force when the notice from two-thirds has been received. It seems to me clear, therefore, that unless notice is given by two-thirds, the protocol remains in force.

Professor MANLEY O. HUDSON. Mr. President, it seems to me that the first paper we heard this morning contained a very unfortunate confusion between the court's exercise of advisory jurisdiction and its compulsory jurisdiction. I think those two things ought never to be confused. The court, in giving an advisory opinion, is doing exactly that. It is not attempting to give a judgment that would bind anybody. The advisory opinion does not bind anybody. I thought it most unfortunate that the writer of the first paper should have referred to advisory opinions in connection with compulsory jurisdiction. But for that confusion, I feel certain that he would not have made the statement which he did make about the terms upon which the United States is to adhere to the Protocol of 1920.

With respect to the latter part of this discussion, Mr. President, it seems to me that the matter on which issue has been joined is not one of any reality—surely not reality, at any rate, in this circle; it may have some importance in other circles where fears exist which I take it lawyers are not likely to entertain.

Mr. Kingsbury outlined what the Protocol of Accession would accomplish for the United States. It would place the United States in a very special position. In the first place, with respect to our payment of our share of the expenses of the court, that share would be determined by the Congress of the United States. That is not true of any other state. In the second

place, the protocol would place the United States in a position of equality with members of the League of Nations with respect to their votes for or against a request for an advisory opinion. Surely that is achieving for the United States a very special position.

It seems to me it would be a great mistake for one to consider the effect of a protest by the United States, as if the court's advisory opinion were going in some way to bind the United States. Suppose the United States did have an interest. Nobody is bound by the advisory opinion. The United States would not be bound in any way whatever. But if the United States has an interest, or claims an interest, it goes before the Council when a proposal for a request is pending, and there exercises all of the prerogatives of any other state engaged in considering that request. Now, as practical people, we know that it is most improbable that a request for an advisory opinion would ever be made against the expressed desire of the United States; and if it were made, the very object of the protocol would at once fall, because the United States has a clear privilege of withdrawing from maintaining an institution because that request has been made.

In dealing with questions of this kind, one cannot hope to foresee every possible contingency and at the same time to resolve that contingency foreseen in the most unfavorable light possible. If one applied that same attitude to the Constitution of the United States, I suggest that he would have to predict that the Constitution of the United States would not work for twelve months. There are many questions left open in the Constitution of the United States. A President of the United States, so far as the language of that instrument goes, might choose every member of his cabinet from his own home state. There is nothing to prevent it. But in these matters, in all institutional functionings, there is such a thing as a practical reality. I submit that the practical reality of this situation is as Mr. White explained in the latter part of his paper, and does not have to do with the problem that he dealt with in the earlier part of his paper.

For my part, the entire substance of the Senate resolution seems to be entirely met by the provisions of this protocol. There is a statement in Article 5 upon which I thought Mr. White might have laid somewhat greater stress, that it is "with a view to insuring that the Court shall not, without the consent of the United States, entertain any request for any advisory opinion." Mr. White seems to me to have drawn too large a conclusion from the provision concerning withdrawal. That is a provision relating not merely to withdrawal by the United States, but it is a provision also for a denunciation or a withdrawal by the other states which are parties to the protocol. There may well be reason for the inclusion of a statement of that kind with reference to withdrawals, even though, as is stated in the introduction to Article 5, the whole arrangement is for the purpose of insuring that the court shall not, without the consent of the United States, entertain any request for an advisory opinion.

But I do not want to dwell on those technical phases of Mr. White's argument, because it seems to me it ought to be appreciated by the members of this Society that that argument does not meet the realities of this question. The realities of the question are that an institution existing for ten years has functioned most successfully; that the United States is to be admitted, not to any agreement that that court may exercise any jurisdiction—nobody is proposing that—but the United States is to be admitted merely to participation with other states in maintaining that institution; and that admission is to be, so far as we are concerned, on a very special basis. It seems to me the basis is so special that it ought to satisfy the most insistent person with respect to this subject.

(Several members addressed the chair.)

The PRESIDENT. The Chair recognizes Miss Allen.

Miss ALLEN. I shall be glad to defer to Mr. Peaslee, as I am sure his remarks are on the subject just discussed, and mine are in answer to Professor Wright's remarks.

The PRESIDENT. The Chair understands Miss Allen withdraws from the court. The question now is whether Mr. Peaslee shall reply. I am informed that Miss Thompson has on two occasions attempted to catch the eye of the Chairman.

Mr. PEASLEE. I shall be delighted to yield to Miss Thompson, if I may speak later at some time.

The PRESIDENT. I shall be very glad to accept Mr. Peaslee's suggestion.

Miss HOPE KEACHIE THOMPSON. I have listened with a great deal of interest to your entertaining speeches. Mr. Jessup's theory of the text is that although Senate Reservations 1 and 3 are omitted from the provisions mutually agreed upon and are not included in the terms of the conditions set out in the Protocol of Accession, nevertheless they have been accepted or adopted *in toto*. If that theory of the text is correct, then I submit it is a sloppy piece of drafting, for practical people—we prefer to have all the provisions agreed upon in one document. One would be called upon to hunt up the Senate resolution to learn what provisions had been agreed upon by the parties in this protocol if we accept Mr. Jessup's theory. For the convenience of those who in the future may be called upon to consult this protocol if the Senate should consent to ratify it, I should like to call attention to the fact that if it were the intention of the parties to agree to Senate Reservations 1 and 3, then there could be no objection by practical people to incorporating in the Protocol of Accession Senate Reservations 1 and 3 *verbatim*.

I should like to call attention also to the fact that the French text is equally authoritative with the English text, and that there are many discrepancies between the French and the English texts as interpreted by Mr. Jessup and Mr. Hudson. I can vouch for the texts of this document [exhibiting document] being authentic. I obtained this photostat copy of the

Protocol of Accession from the Department of State last June. I have checked this photostat copy with the document on file with the Executive Clerk of the Senate. It is the same document. If you turn to Article 1 in the French text, you will find that instead of the acceptance being "on the terms *and* conditions," it is "on the terms *of the* conditions" stated in the articles of the protocol that the special conditions have been accepted.

I have suggested to several of the editors that they publish in the *AMERICAN JOURNAL OF INTERNATIONAL LAW*, in the supplement, the complete text of these documents, French and English, for I still believe that there are some members of this Society who are intellectually honest and who have the mental ability to understand what these documents mean.

Mr. PEASLEE. Mr. President, I should like to say just a word in reply both to Mr. Hudson and to Professor Jessup. I certainly count myself a supporter of adherence to the protocols; but I do not think it is worth while to try to convince the Senate that we should adhere by urging what seem to me to be unsound reasons for it.

There is, in my judgment, no assurance whatever either that the Council will not request advisory opinions without a unanimous vote, or that the court will not proceed to render an advisory opinion which may affect a state which is an adherent to the court. Certainly as I read the debates in the committee, and have read various debates dealing with the subject of unanimity, it seems to me perfectly evident that the right is reserved to the Council to act without unanimity, and that there is a probability that it may in the future exercise that right. The Eastern Carelia case is no guarantee whatever that the court will not render an advisory opinion affecting the rights of an adherent to the court, because Russia, of course, was not an adherent.

Professor Hudson says that the United States is not bound by advisory opinions. Well, of course there is no world sheriff, and we are in a sense not bound by any judgment or opinion.

Professor HUDSON. Oh! Oh!

Mr. PEASLEE. I entertain no misgivings as to the difference between an advisory opinion and a judgment; but I do say that we would be morally bound if the court should render an advisory opinion affecting the interests of the United States. In my opinion we would as much as we would with respect to an actual judgment.

I did not intend to say, and I do not think I did say, as Professor Jessup suggested, that the right to withdraw from the court was created by the Root formula. What I did say was that, were it not for the right to withdraw, so excellently expressed as it is in the Root formula, there would be an additional immeasurable element of compulsory jurisdiction if the Senate should accede to those protocols. I certainly hope it will accede to them. I endorse entirely Mr. White's interpretation of the language; and I think, with all due respect, that we are on much safer ground if we take that ground

before the Senate than on the ground expressed by Mr. Hudson and Professor Jessup.

Mr. HUDSON. Do not associate Mr. White with your views, though, because he has not said anything like your views.

Secretary FINCH. I do not wish to interrupt the continuity of this very interesting discussion; but there was only one member of the Committee on Nominations present this morning when I made the announcement. I notice that several more have come in. I should like to repeat the announcement that the Committee on Nominations is composed of Mr. Temple, Mr. Hudson, Mr. Martin, Mr. Hackworth, and Mr. Warren. Mr. Temple, who is chairman by virtue of being first named, has asked that the members of the committee meet him at the rear of the room when we adjourn this morning, so that he can make arrangements to have the committee function in order to be able to report at the meeting of the Society tomorrow morning.

The PRESIDENT. Mr. Borchard, who has previously asked recognition, has the floor.

Professor EDWIN M. BORCHARD. Mr. President and members of the Society: It is sometimes overlooked, I think, how Article 5 got into the Senate's reservations. There was an opinion of a member of the court after the Eastern Carelia case to the effect that the court should give secret opinions to the Council of the League, and several members were willing to give an opinion even though Russia was not represented and objected. That was answered by another memorandum—there is nothing confidential about this, because it is published in the 1924 or 1925 annual report of the court—that that would be highly derogatory to the independence of the court. The Council of the League censured the court for its attitude.¹ For that reason it seemed important that a nation not a member of the League and not a member of the Council should be safeguarded both against the possibility of secret opinions and against the possibility of any opinions on a question on the submission of which it did not have any right to vote. I think Reservation 5, therefore, was a perfectly intelligible and proper kind of reservation for the United States, in its present position, to make. It certainly did not indicate opposition to the court; and I think anybody who supported Reservation 5 can hardly be said to be an opponent of the court.

The Root formula has been presented as a way out of the deadlock. In my humble judgment, Mr. White's analysis of the relation between the two is unanswerable. But if, as many people assert, the two mean the same thing, what would the proponents think of a resolution like this:

The Senate, in giving its consent to the ratification of the new protocol now embodied in the Root formula, interprets it as meaning exactly the same thing as Reservation 5, and (a) stands by Reservation

¹ Official Journal, Nov. 1923, pp. 1335-1337, 1501-1502.

5, or (b) stands by Reservation 5 and the new protocol, both appearing as part of the instrument of ratification.

Would that be acceptable? Then the United States will give to the new protocol the meaning, if not the exact literal wording, of Reservation 5. After all, a great many Senators voted for Article 5; and it seems to me they would have to be convinced that the new formula interprets and expresses the exact idea embodied in Article 5.

Mr. Hudson suggested that we should be realists. I am inclined to welcome that suggestion; but if he thinks that the United States would not be bound by an advisory opinion I should think that were not quite realistic. For us to defy a court rendering an opinion in the most solemn form, and then to say that we are doing nothing but that which is within our privilege, would seem highly unrealistic. I think that we would be as effectively bound by anything that the court concluded or determined, whether in an advisory opinion or a judgment, as we would be bound by a judgment of the United States Supreme Court. I find it difficult to escape from that view.

As this question is going to become a practical question very soon, however, it seems to me that perhaps the members of the Society ought to work out some formula, some resolution perhaps, by which there can be either a reconciliation of the divergences between the Root formula and Reservation 5, which I seem to see very clearly, or else a method of asserting in some acceptable form that they really mean just one and the same thing, and were intended to mean one and the same thing.

THE PRESIDENT. May I beg the indulgence of the members for a moment? I have to withdraw presently to take up some matters connected with the affairs of the Society; and I shall ask Dr. Hill, as Vice-President, if he will not be good enough to preside.

I should like to say, if it would not be called going beyond the scope of the Chair, that last year I spoke upon these matters, confessing my faith in advisory opinions, believing that they are an essential function of the court, indeed that they are superior to adjudged opinions, and that I consider them as a judicious exercise of judicial power. I therefore am in favor of the participation of the United States and largely because of advisory opinions. I should like merely to say that in leaving you, so that the views I have may be upon record, and that you would not have the idea that I am withdrawing without making an expression of my faith.

(Dr. DAVID JAYNE HILL, Vice-President, then took the Chair.)

Miss ALLEN. I should like to answer Professor Wright's remarks. The point that I intended to make was simply that neither in Article 36 of the Statute nor in the Optional Clause itself is there any express provision for ratification of the signature to the clause. In addition to this, I do think that the language of the clause is significant when it says that the obligatory jurisdiction is accepted "from this date." I did not intend to

base the authenticity of my statement upon that language. It is, of course, a well known fact that many states have been considered bound by the Optional Clause upon simple signature of the clause. On the other hand, I thought I was careful to state that a great many states had signed the Optional Clause expressly subject to ratification. I think we may assume that in cases where constitutional requirements necessitate it, that is the method of signing the clause; and it seems to me that is the normal method for the United States to adopt in signing the clause, if it ever gets that far.

Vice-President HILL (presiding). The subject is still open for discussion.

Professor QUINCY WRIGHT. Mr. Chairman, I have spoken once. If anybody else wants to proceed, I think he should have the right.

Vice-President HILL (presiding). Proceed. Mr. Wright has the floor.

Professor QUINCY WRIGHT. I am very much interested in Mr. Jessup's argument, which, as Mr. Borchard construed it, means substantially or perhaps absolutely that the other parties to the protocol have accepted the five reservations. I must confess that I have not heard anything this morning which convinces me that Mr. Jessup's interpretation is not sound. I should like to address myself to the points which Mr. White made on this matter. He attacked Professor Jessup's interpretation on three grounds.

The first of these was certain passages in the debates of the conference which framed the protocol which emphasized the participation of the United States in the request for an advisory opinion. It does not seem to me that that debate went to the question of the bar to the jurisdiction of the court. It was debate on the participation of the United States in the request for the opinion.

The second point Mr. White made was something like this, as I understood it: "Why should we have this provision giving the United States a qualified bar to the request if it has an absolute bar to the jurisdiction"? It seems to me that that is an entirely possible situation, that we should have these two bars,—first, a qualified bar to the request; second, an absolute bar to the jurisdiction. It does not seem to me unreasonable that these two bars should exist as entirely distinct steps in the process, because of the incidence of responsibility in case a suggested procedure for the settlement of an international dispute is frustrated.

That question, I may say, was prominent in the minds of the persons who participated in the debate of 1926. I was not present at the debate in 1929. In 1926 the question of who would be responsible in case there was a thwarting of a proposal for settling an international dispute was considered important. If the Council does not make the request, you may say the responsibility is with the Council. It may be that the submission for an advisory opinion appeals generally as the way in which a dangerous international dispute can be put on the road to settlement. If the Council does not make the request, then the responsibility is on the Council. On

the other hand, if the Council makes the request, and the United States interposes a bar, then the responsibility is on the United States; and it might very well be that the Council would like to have defined precisely the extent to which the United States can impose this responsibility on the Council, as something entirely distinct from the responsibility of the United States if it independently undertakes to bar the exercise of advisory jurisdiction by the court.

The third point which Mr. White made was in regard to the article dealing with withdrawal. Mr. White paraphrased this article several times. Each time he stated it something like this: "If it shall appear that no agreement can be reached, and the United States is not prepared to forego its objection"—Mr. White then read—"it may withdraw." I noticed that every time he referred to it, he used that paraphrase—"it may withdraw." That is not what the article says. It says:

If it shall appear that no agreement can be reached, and the United States is not prepared to forego its objection, the exercise of the powers of withdrawal provided for in Article 8 hereof will follow naturally without any imputation of unfriendliness.

I submit that the expectation of that article was that here was a state of facts where the other parties to the protocol would naturally exercise the right of withdrawal. Here is a situation where the United States has not indicated that it will refrain from exercising its absolute bar to the court's jurisdiction. The Council may be exceedingly reluctant to bear the responsibility of the dispute not being settled. Thus, it would be a very natural occasion when the other parties to the protocol would exercise their right to withdraw given by Article 8. I suggest that that—and I think Mr. Hudson made this point also—is the state of facts which was covered by this article.

MR. WHITE. Mr. Chairman, may I say just one word about that? I think Mr. Wright is mistaken in thinking that the debates to which I referred related only to the right of the United States to interpose an objection in the Council. I am reading now from remarks made by the chairman of the Committee of Jurists as quoted in my address;

To assimilate the position of the United States to that of a member of the League of Nations in cases where a request for an opinion was adopted by a majority vote would not, he thought, satisfy the desires of that country, which really wished to be able in certain cases to veto recourse to the Court even when such recourse had been voted by the majority.

It seems to me perfectly clear that he is speaking about a right to veto the court's rendering an opinion even though the request had been made.

Also, the remarks of Mr. van Eysinga, to which I referred: "There might be a section of public opinion in America which desired to claim the right of veto in cases where a request for an advisory opinion had not been unanimous." In other words, the request had been made, but they would

claim the right to veto; and he goes on to say: "The committee now learn that the United States would be content if it were allowed to withdraw in such circumstances."

It may be that I was somewhat inaccurate in my reference to the right of withdrawal; but there is one feature of that which has not been mentioned which it seems to me should be taken into consideration, and that is this—that the United States and the other parties to this treaty are by no means in the same situation with regard to the right of withdrawal; if the question comes up as to whether an advisory opinion should be given, and the United States has the right to say "no" and interposes a bar to the jurisdiction of the court, the United States can withdraw immediately if it desires to do so; but if the other states wish to withdraw so as to free the court, two-thirds of them have to act; and that might take months or even years of time.

So it seems to me that in reality the reference at this point was to the right of the United States to get out, if it felt that it was in a situation where it did not wish to remain in, and thus perhaps be more bound by the advisory opinion—if I may use that expression—than it would be if it were outside altogether.

Mr. JOHN NICOLSON. Mr. Chairman, I rise only to remind you of an episode from our own constitutional history which I think has some application. I wish to apply it to the very high esteem that we all have for any opinion expressed by Mr. Elihu Root; and on that opinion Professor Jessup relies very largely.

The episode arose out of that provision of the Constitution which says that the Supreme Court of the United States shall have jurisdiction over suits between a state and a citizen of another state. Most of us, perhaps, remember our *Federalist*, and will remember the views of James Madison and Alexander Hamilton expressed to the people of New York on the meaning of that provision. Their opinions were entitled to and did receive very high respect. Their attitude was that "of course" a citizen of another state could not bring a state to the bar of the Supreme Court. That was fundamental. It could not mean that. It did not mean that. It was not intended to mean that. They convinced the people of the State of New York that they could not be sued by a citizen of the State of New Jersey, and New York adopted the Constitution.

Not very long after that, Mr. Chairman, a citizen, I think of South Carolina, did bring a state, the State of Georgia, before the Supreme Court of the United States; and, notwithstanding the opinions expressed by James Madison and Alexander Hamilton that it could not be done, the Supreme Court held that it had jurisdiction of the suit; resulting in the eleventh amendment, which, you will all recall, eliminates the jurisdiction.

If I may continue for a moment, on another aspect of the matter, and then I shall be through. I think Professor Hudson overlooks the distinction between being bound by a judicial decision because you are a party to the

suit and being bound by it because it is a precedent of the court. A decision of the Supreme Court even of the United States is, of course, not binding upon another citizen of the United States who is not a party to it; but when that other citizen of the United States gets before that court and is confronted with the fact that a decision has been rendered by it in a matter on all fours with his own case, he *is* bound by it. And so with these advisory opinions: You are confronted with the fact that the World Court will have rendered an opinion. The fact that you have not been a party to it does not matter; the fact remains the opinion has been rendered, and if we should have an international case with like facts, we will be confronted with it—as a precedent.

I find myself in hearty accord with Mr. White's paper. It is interesting to note that the last speaker said that he had heard nothing which disrupted the argument of Professor Jessup. It is interesting to remember that Mr. Borchard said that he regarded Mr. White's paper as unanswerable. I will take the middle of the road in my reference to it and say I think that Mr. White's paper is most convincing.

Professor HERBERT WRIGHT. Mr. Chairman, it seems to me the effect of Article 5 of the Protocol of Accession might be summed up as follows:

Article 5 of the Senate's reservations, that is, the second part of Article 5, provides in effect that no advisory opinion in which the United States has or claims an interest shall be rendered by the Permanent Court of International Justice without the consent of the United States.

Article 5 of the Protocol of Accession provides, in effect, that no advisory opinion in which the United States has or claims an interest shall be rendered by the Permanent Court of International Justice without the consent of the United States or the United States may withdraw.

It seems to me it makes it disjunctive rather than leaves it absolute.

There is just one other thing I should like to bring before the Society, and that is in connection with Professor Jessup's able explanation of the Root formula. I was wondering if Professor Jessup might give me his opinion on this question:

In Article 5 of the Protocol of Accession it is stated that the Secretary General of the League, in case an advisory opinion is about to be rendered or is desirable, shall communicate with the United States through some agency to be decided by the United States—I forget the exact words. Now, it seems to me that the proposed new Article 68 in the Protocol of Revision makes advisory opinions of the court very closely approximate judgments in contentious cases; and I was wondering if Professor Jessup would be good enough to indicate what agency of the United States would pass upon whether the United States has or claims an interest. Is it the executive branch alone?

Professor JESSUP. Mr. Chairman, that would seem to be a constitutional point on which I do not feel particularly qualified to express an opinion;

but I think we are all familiar with the point of view which the Senate has taken, especially since about 1904; namely, that in situations in which the United States desires or is inclined under some general treaty or otherwise to refer a case to international adjudication, arrangements for that submission must be by and with the advice and consent of the Senate.

I suppose it would be possible to say that if an advisory opinion is requested regarding a dispute to which the United States is a party, the similarity existing between that situation and the situation of a dispute submitted for judgment would indicate that the procedure applicable in the contested cases should apply.

On the other hand, if the United States is not a party to a dispute, but there is a question in which we have an interest, and it is proposed to request an advisory opinion regarding that question, I should think it might be quite possible to say that that was within the discretion of the Executive. On the other hand, I believe we have recent indications that there may be some relaxation in the point of view of the Senate with respect to insisting that it should be consulted in advance in each case under these circumstances. That is particularly true with reference to conciliation commissions, where the commission is not empowered to decide, but merely makes a finding of a recommendatory nature. Since an advisory opinion does not decide a dispute, but merely suggests the conclusion of the court as to a point of law involved, I should think it would be perfectly reasonable to assimilate the advisory opinion situations to the situations in which we refer cases to conciliation commissions by authority of the Executive, without the essential participation of the Senate.

Professor BESSIE C. RANDOLPH. Mr. Chairman, I should like to mention one point, and, in addition to that, to ask a question, following up Professor Jessup's suggestion a minute ago about the view of the Senate.

In the first place, one of our speakers said a minute ago that while the United States might not be a *party* to an actual advisory opinion, so to speak—for that is being assimilated more and more to regular adversary cases before the court—we would still be bound by it as a sort of precedent; and that is quite true. A good deal of political embarrassment might come up in that connection; but it should not be overlooked, it seems to me, that quite a good deal of political embarrassment might come up anyway in connection with the United States, whether we acceded to the court or not; and it is quite possible that the giving of an advisory opinion, let us say, between two states of the American hemisphere—two of the Latin-American Republics—might be embarrassing also. I do not think that by putting up any number of safeguards in our entrance to the court organization we shall entirely obviate any and all embarrassments which advisory opinions might cause in the future.

In the second place, I should like to listen to further comment from Professor Jessup or someone else, as a matter of practical politics, in regard

to the attitude of the Senate in submitting any one case for an advisory opinion before the court. The Senate, I think, in its discussions, certainly in 1926, was thinking of and desiring not merely a suspensive veto—I do not like the word “veto”; I think it is too strong—but an absolute veto; the suspensive veto was not enough for it. What it really wanted, or at least had in mind, was an absolute and final veto by the United States.

From some other of those here present who know the workings of the mind of the Senate, particularly of the Foreign Relations Committee of the Senate, I should like to hear further discussion in the course of the day as to whether those members still think that anything like a final and absolute veto will practically run back to the United States, because as a matter of practical voting by the Senate upon its consent to the ratification of the three protocols, that, it seems to me, would be a matter of immense importance.

Mr. HOLLIS R. BAILEY. Mr. Chairman, ladies and gentlemen: Just a single word to point out that Professor Hudson went too far in saying that advisory opinions and judgments are about the same. In Massachusetts we have had advisory opinions from the Supreme Judicial Court for one hundred years or more. They are printed in the reports, and they are binding in this way: Those opinions are rendered by the court upon requests of the legislature as to whether proposed legislation would be constitutional or not, or on request of the Attorney General on some particular point on which he needs advice; and I have never known so far that anybody undertook to consider an advisory opinion as otherwise than binding. We consider them so. Therefore, as the court says from time to time, “Of course if this question comes up before us in a matter between party and party, we are not bound by this advisory opinion”; but as a reality they are binding.

Miss HELEN DWIGHT REID. Mr. Chairman, I should like to get back to this point of reality. It seems to me we have touched on it at a good many places today, this reality of the situation, and yet, in regard to advisory opinions, are we really facing realities?

The reality is that we have at the present time no veto whatever. We have a power of expressing our objections through the ordinary diplomatic channels. That would be a rather roundabout, complicated situation, certainly impossible as a means of effective action in checking any submission to the court, whether an advisory opinion or any discussion of the matter. At least we would have, under this protocol, a right of expressing our views and of having our views expressed immediately and effectively; the procedure is even set out by which those views can be expressed; and we would also have a real and effective check upon submission of the dispute to the court.

It seems to me that the matter of how long and under what means that veto is to be made effective is a relatively insignificant factor. Certainly it is not to our advantage to withdraw from this protocol if in any instance our views are not accepted. Whether or not you accept Mr. Jessup's viewpoint

—which, after the very enlightening debate today, I feel myself somewhat inclined to accept, although it was new to me at the time—whether or not you accept that, the fundamental result is still the same, that we can get a check only through belonging to the court under some such means as this protocol.

Vice-President HILL (presiding). We are approaching the time of adjournment in order to have luncheon and a little rest in between the sessions; but there is one question which has not been raised and certainly has not been even inferentially answered, and yet it is quite vital to the interpretation of this Protocol of Accession. I refer to Article 5, the third paragraph, in which a vote is called for—a vote in which the United States is to have a voice of the same force and effect as attaches to a vote against asking for an opinion given by a member of the League of Nations in the Council or in the Assembly.

It seems to me quite vital for us to know what it is that is to be voted upon. Is it the question whether the United States has an interest or claims an interest in a particular matter, or is it the question whether the court may render an advisory opinion or may not render an advisory opinion? What is the subject that is to be voted upon when the United States exercises its prerogative of casting a vote about something? That, I think, ought to be made very clear; and so I will take the liberty of asking Mr. Jessup if he will state his view upon that point. What is it that is to be voted upon when it comes to a vote as prescribed in the third paragraph of the fifth article of the Protocol of Accession?

Professor JESSUP. Mr. Chairman, I regret that my attention was distracted for one moment there. May I offer a suggestion?

There are two committees which were planning to meet at the close of this session, and I believe that the subject of the court is also to be taken up at the afternoon session. If it is satisfactory to the Chair, I would suggest that we might continue the discussion after this afternoon's paper, if that would be agreeable.

Dr. HILL (presiding). Perfectly so. My only point was that this point, which seems to me vital to the interpretation of the whole meaning of the fifth article, should be taken up at some time and elucidated. As you are engaged in some other and perhaps more important matter at the moment, will you permit me to state, Mr. Jessup, what that point is?

Professor JESSUP. Yes, sir.

Dr. HILL (presiding). In the third paragraph of the fifth article of the Protocol of Accession, reference is made to taking a vote—a vote in which the United States, if it raises an objection to asking for an advisory opinion or the court rendering an advisory opinion, is to have the same force and effect as the vote of any member of the League of Nations in the Assembly or in the Council.

The point is this: What is that process of voting to be about? Is it about the question whether the United States has or claims an interest in a

particular matter which is to be discussed and an opinion rendered upon it by the court? If so, what business has any other nation with the question whether the United States has or claims an interest? If it is not that, then is the question whether or not the court shall be asked for an advisory opinion on that subject? And if it is to be asked, that implies that the court has the power to offer an opinion. That leaves the whole matter of the determination of whether there is to be an advisory opinion on that subject to the voting, in which every member of the League has an equal voice with the United States.

What I am endeavoring to get at in a clear statement is this: What is the purpose of this voting? Is it to determine whether or not the United States has an objection, or claims an interest, or has an interest, or anything to do with the United States? If so, what have these other representatives of states to do with that question? That is my question; and I only put it in that way now in order that it may be taken up at a subsequent date, if that is desired, or now, as you please.

Professor JESSUP. Mr. Chairman, I think I can express my own view on that subject very briefly, if you care to have me do it now.

Dr. HILL (presiding). Please do so.

Professor JESSUP. I preface it with a humble apology to you, sir, for allowing my attention to be distracted for a moment while you were speaking before.

In my opinion, the exchange of views which is provided for in the first two paragraphs of Article 5 of the protocol is directed, in the clear terms of the protocol, to ascertaining whether an interest of the United States is affected. The additional provision regarding voting power is not related to the same point as the exchange of views. In my opinion, the vote is upon the question: "Shall the Council request the court to give an advisory opinion, notwithstanding the fact that under the first two paragraphs the exchange of views has revealed that an interest of the United States is affected?"

The vote would, therefore, be on the question of requesting the court to give the opinion. If the majority rule prevails, and if the United States is outvoted, the Council may request the court for an advisory opinion; but under the interpretation of the protocol which I endeavored to explain, in my opinion the court would still be without jurisdiction to entertain that request.

In other words, there is a complete differentiation between the proceedings in the Council, which requests the opinion, and in the court, which entertains the request. However, the practical reality back of that might be this: That the Council, in the improbable situation that they did not wish to agree with the United States, when no conciliatory formula might be found to reconcile their points of view, wishing to push ahead and force the issue, might desire to request the opinion in order that an opportunity might be

afforded for terminating this whole arrangement, either by the exercise of the power of withdrawal on the part of the United States, or by the exercise of the power of withdrawal on the part of two-thirds of the other signatories.

Dr. HILL (presiding). Thank you, Mr. Jessup. That raises another question which ought at some time to be followed up and discussed. It seems, then, that the Council has the right and might avail itself of the privilege of asking for an advisory opinion, contrary to the objection of the United States. Would it not be a futile thing, provided the court is already barred from rendering an opinion when there is such an objection from the United States? Would it not be an empty futility to propose a question to a court which is barred from making an answer? And it has been alleged here, without pointing out textually the basis on which that assumption rests, that the court is barred by the Protocol of Accession from rendering any opinion contrary to an objection of the United States if the United States has or claims an interest.

As to whether it has or claims an interest is not an affair of other people, but of the United States; and if it persists in holding to the objection—I discard all the atmosphere of probabilities; here is a contingency that may occur—if it persists in holding to its objection, what is the purpose of propounding a question to a court that is barred from giving an answer? Therefore it appears reasonable, does it not, that it would be futile to ask such a question? And it could only be considered to be asked on the assumption that the court is not barred from rendering such an opinion.

I do not mean to take the opportunity of presiding over this honorable body to debate this question, and I have not answered or attempted to answer any question; but I have wished to give point to what seems to me to be a very vital question in the interpretation of this whole document. That is the question whether or not the court is really barred from giving an advisory opinion contrary to the desires of the United States in the circumstances under consideration.

Now we are ready for a short further discussion, but we are approaching the time of our adjournment. It is now a few minutes after one. The Chair will listen to anyone who has anything to say on this subject.

No one seems to rise to make a statement or ask a question. It would be appropriate, therefore, that this meeting be now adjourned until 2.30 o'clock this afternoon, in the same place.

(Upon motion of Secretary Finch, duly seconded, the Society thereupon adjourned until 2.30 o'clock p. m. of the same day.)

THIRD SESSION

Friday, April 24, 1931, 2.30 o'clock, p. m.

The afternoon session was called to order at 2.30 o'clock p. m., in the Willard Room of the Willard Hotel, President James Brown Scott presiding.

The PRESIDENT. The topic for this afternoon is "The independence of the Permanent Court of International Justice in its constitution and jurisdiction, and in the law to be applied." The leading paper on the subject is to be presented by Manley O. Hudson, Bemis Professor of International Law, Harvard University, with an additional title of being, in my humble opinion, the one man in the English-speaking world best qualified to discuss the subject.

THE PERMANENT COURT OF INTERNATIONAL JUSTICE

THE INDEPENDENCE OF THE COURT IN ITS CONSTITUTION, IN ITS JURISDICTION, AND IN ITS APPLICATION OF LAW

BY MANLEY O. HUDSON

Bemis Professor of International Law, Harvard Law School

To any informed student of the Permanent Court of International Justice, it must seem a bit strange that our Society should devote a session to the discussion of this topic. There can be but one excuse for our doing so, and I am not wholly convinced that the excuse is a good one. The pending proposal for the adhesion of the United States to the Protocol of Signature of the Statute of the Court is being opposed in some quarters on the ground that the court is not an independent judicial tribunal, but is somehow subservient to the League of Nations. The contention is sometimes made in the form of a statement that the court is "not a World Court, but the League of Nations Court,"¹ and this is intended to connote that the court lacks the necessary independence to enable it to serve all the nations of the world on an equal basis. Such a contention would make little appeal to those who have been *au courant* with the development of organized international coöperation during the course of the past decade; and I would not dignify it in a presentation to this Society except for the fact that it has led to some impeachment of the integrity of the Permanent Court of International Justice at a time when it is important that the American people should know the facts, and should know them straight.

I shall address myself to three questions: Is the Permanent Court of International Justice independent in its constitution? Is it independent in the jurisdiction which it may exercise? Is it independent in its application of law?

¹ See Senator C. C. Dill, in the *Advocate of Peace*, February 1931, p. 37.

THE CONSTITUTION OF THE COURT

The Permanent Court of International Justice exists under a statute, to which force is given by an international instrument called a "Protocol of Signature." This protocol has been signed on behalf of fifty-five states, of which the United States is one, and ratified by forty-five states, of which the United States is not one.² Though it is called a *protocol*, it might with no less accuracy have been called a treaty or a convention. It is the protocol and that alone which gives life to the Statute of the Court, and the statute is, as Judge Kellogg recently observed, the "fundamental law" of the court.

Both the protocol and the statute must be interpreted, however, in the light of their history. Their origin is to be traced to Article 14 of the Covenant of the League of Nations, the first sentence of which provided that the Council should "formulate and submit to the members of the League for adoption plans for the establishment of a Permanent Court of International Justice." This mandate having been executed, the force of that sentence is now spent. Two additional sentences related to the jurisdiction of the court, and to its giving advisory opinions; these were incorporated by reference into Article 1 of the Statute of the Court, and their provisions are in force today, because of this incorporation, as provisions of the statute itself.³ It would seem proper to say, therefore, that the Covenant of the League of Nations as such forms no part of the organic law of the court, and that the statute is its only organic law.

One further point should be noticed, however. When the plans for the court were "formulated" in a draft statute, they were submitted by the Council to the members of the League of Nations, through the Assembly of the League of Nations. It was in the Assembly that the statute achieved definitive form, and on December 13, 1920, the Assembly adopted a resolution declaring its "approval" of the draft, and directing the preparation of a protocol to be signed and ratified, by which the states should declare their "recognition of this statute." Certain provisions of this resolution, relating to the statute's coming into force and to its remaining open for signature by certain states, were incorporated by reference into the Protocol of Signature. The resolution did not purport to establish the court; it did not even purport to give force to the statute; it is to be treated as one of the stages in the preparation of the statute, but it forms today no part of the court's organic law, nor has the Assembly assumed a competence to deal with changes in that law during these intervening years. In 1926, when a proposed adhesion by the

² For various lists, see 25 American Journal of International Law (1931), pp. 13 ff.

³ Article 1 of the statute reads in part: "A Permanent Court of International Justice is hereby established, in accordance with (*conformément*) Article 14 of the Covenant of the League of Nations." If this did not incorporate the second and third sentences of Article 14 of the Covenant, it might be possible for these sentences to be amended, according to Article 26 of the Covenant, without the consent of all states parties to the statute through ratification of the Protocol of Signature. See the writer's discussion of this point in International Conciliation, No. 214 (November, 1925), pp. 328 ff.

United States was under consideration, the matter was dealt with not by the Assembly, but by an independent conference of the signatories to the court protocol, and the same procedure was followed in 1929 when it was proposed to amend the Court's Statute. Strictly, therefore, though no one should minimize the admirable rôle played by the Council and the Assembly of the League of Nations and by the Committee of Jurists set up by the Council, the court does not legally owe its existence to any action except that taken by the various states in signing and ratifying the Protocol of Signature. The action of the Assembly in approving the draft statute, and its action again in 1929 in approving the draft protocol for a revision of the statute, can hardly be looked upon as one of the legal steps taken to bring the court into existence or to shape its constitution.

If these conclusions be shared, it may then be agreed that the Protocol of Signature, equivalent for this purpose to a treaty, is the only instrument effective for giving force to the Statute of the Court, and that the Statute of the Court is its only constitution. No state which becomes a party to the Protocol of Signature thereby assumes any obligation contained in any other than these two instruments. In its constitutional form, the court is independent of all other agencies except the states which created it.

This is not to be understood as implying, however, that the substantive provisions of its constitution leave the court wholly unrelated to other bodies. There is a very intimate relation between the court and the League of Nations, according to the provisions of the statute itself. In the first place, the judges of the court are elected by the Council and Assembly of the League of Nations. Obviously, they must be elected by an international group of some kind; and for this purpose these bodies serve admirably. Since 1921, six elections have been held, and I think the ease with which they were conducted⁴ has been a surprise to every one familiar with the difficulties encountered at the Hague Peace Conference when the effort was being made to set up a permanent international tribunal. Not only are the Council and Assembly convenient bodies for the election, especially convenient because of their periodic meetings, but in their very composition they have solved the difficulties which wrecked earlier efforts. The composition of the Assembly is based upon the principle of equality of states, so that smaller states are assured of a voice in the election of judges. The composition of the Council, on the other hand, takes account of the special position of more powerful states which are entitled to permanent representation on the Council. The larger states are therefore assured of voting in both of the electoral bodies. The significance of this adjustment cannot fail to be appreciated by any one who is familiar with the experience of the Second Peace Conference at the Hague. But perhaps its importance lies chiefly in the fact that it surmounted the principal obstacle to the creation of a court. The potential

⁴ See the writer's study entitled "The Election of Members of the Permanent Court of International Justice," in 24 *American Journal of International Law* (1930), p. 718.

control of elections which may be exercised by the great Powers, is now less than it was; in 1921, when the first general election of judges was held, the Powers permanently represented on the Council were four out of eight; in 1930, when the second general election of judges was held, they were five out of fourteen. This change has produced no dissatisfaction with the system of elections among states members of the League of Nations. If the United States should adhere to the Protocol of Signature, on the terms now proposed, its representatives would be added to the Council and Assembly to form the electoral bodies; and if the pending revision of the statute should become effective, arrangement might also be made for the addition of representatives of Brazil and of other states similarly situated. The electoral system is not intended to exclude states not parties to the Covenant of the League of Nations; it is a convenient system; it has proved itself workable; and it leaves the judges of the court as free as any acceptable system which might be devised. I must conclude that the court is in no way dependent on other bodies as a consequence of this method of selecting the judges who will sit on its bench.

Another respect in which the court has a relation to the League of Nations, is in its financial support. The statute provides (Article 33) that "the expense of the Court shall be borne by the League of Nations." This is a short way of saying that the expenses are to be borne by the states members of the League of Nations. As the forty-five states which have ratified the Protocol of Signature are all, save Brazil,⁵ members of the League of Nations, it is very natural that they should desire to avoid the necessity of any wholly independent budget for the court. The court's budget now amounts to almost \$500,000 a year. The determination of the amount of each state's contribution presents difficult questions, which have already been satisfactorily solved in connection with the expenses of the League of Nations; and a machinery for collecting and disbursing such large sums of money has been established at Geneva. It would have been folly to duplicate such machinery. The utilization of the financial organizations of the League of Nations does not rob the court of one iota of its independence; indeed, it renders the court truly independent by relieving it of all responsibility for financing itself, beyond that of saying each year how much money it needs. Under any possible system, the court's annual budget would have to be approved by the states which supply the money, and the Assembly of the League of Nations is the most convenient form for the expression of that approval, even though it includes representatives of states which have not ratified the Protocol of Signature. No judge's salary can be reduced during his term of office, and in this respect the judges of the Permanent Court of International Justice are as independent as the judges of the Supreme Court of the United States.

It is only in these two respects that the constitution of the court con-

⁵ Brazil ceased to be a member of the League of Nations on June 12, 1928.

nects it with the League of Nations. I believe the court is immensely stronger because of the connection; its permanence is better assured, its functioning is facilitated, and it is relieved of problems which might otherwise grow embarrassing. It seems to me that there is not the slightest ground for saying that this connection destroys the independence of the court for judicial work.

JURISDICTION IN CONTESTED CASES

The jurisdiction of the Permanent Court of International Justice is of two kinds: it has jurisdiction to adjudicate disputes between states; and it has jurisdiction to give advisory opinions. Both kinds of jurisdiction were mentioned in those parts of Article 14 of the Covenant of the League of Nations which were incorporated by reference into Article 1 of the Court's Statute.

The court is not competent to adjudicate a dispute between two or more states unless all parties to the dispute submit to its exercise of such jurisdiction. No such submission is contained in the statute itself; indeed, a state may be a party to the Protocol of Signature to which the statute is "adjoined" without giving to the court any jurisdiction whatever. It is proposed that this course should be taken by the United States, and if the protocol for American adhesion becomes effective, the court will not thereby have any jurisdiction over our disputes. To the statute is annexed, however, a so-called "optional clause," which may be accepted by states which desire to do so. Thirty-four states are now bound by this "optional clause," and have thereby conferred on the court a jurisdiction which is "compulsory *ipso facto* and without special agreement," extending to "legal disputes" in some or all of the following "classes": (a) disputes concerning the interpretation of a treaty; (b) disputes concerning any question of international law; (c) disputes concerning the existence of any fact which, if established, would constitute a breach of an international obligation; and (d) disputes concerning the nature or extent of the reparation to be made for the breach of an international obligation. This provision goes a long way toward making the court's jurisdiction independent not merely of all international organizations, but even of the further expression of the will of the states themselves.⁶ It is too early to express a definite judgment of the value of the optional clause; it has been invoked only in one case, and in that case the proceeding was withdrawn before judgment.

The statute also provides that the jurisdiction of the court comprises "all matters specially provided for in treaties and conventions in force." During the past ten years, numerous treaties have been concluded which provide for resort to the court for the adjudication of disputes or differences. It has become a common practice to include some provision of this sort in

⁶ Most of the states now bound by the optional clause have accepted it for only a limited period.

multipartite treaties; and many of the recent bipartite treaties, particularly treaties of arbitration, have contained it. A collection of texts governing the jurisdiction of the court, published in the court's annual reports, lists 322 instruments under that title. Even the United States is a party to two international instruments which envisage a possible use of the court in connection with their construction: the Slavery Convention,⁷ of September 25, 1926, and the Convention on the Abolition of Import and Export Prohibitions and Restrictions,⁸ of November 8, 1927.

Apart from its jurisdiction under the "optional clause" and under such treaties as I have described, the court has no competence to deal with a dispute unless the dispute is specifically referred to it by the parties thereto. The reference is effected by a special agreement, or *compromis*, and the court has repeatedly shown its determination to confine itself strictly within the limits of such agreements. In such cases there can be no question of the complete independence of the court. In determining whether it has jurisdiction, whether the states concerned have conferred it, the court is subject to no outside influences whatsoever.

JURISDICTION TO GIVE ADVISORY OPINIONS

It is only in connection with the court's competence to give advisory opinions, that the independence of the court has been questioned in America. This competence is usually traced to the third sentence of Article 14 of the Covenant, which states that "the Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly"; but the force of that statement is now derived, not from its inclusion in the Covenant, but from its incorporation by reference into Article 1 of the Statute of the Court. The wisdom of this provision has been abundantly demonstrated during the course of the past nine years; for the court has given seventeen advisory opinions,⁹ and it now has before it two requests for advisory opinions. The exercise of this competence by the court has meant a great increase in both the usefulness and the prestige of the court, and the provision may have saved the court from being merely an ornament on our international shelf.

Effort has been made in some circles in the United States to make it appear that this competence of the court has reduced it to the position of merely a legal adviser to the Council and Assembly; but any one who studies the actual procedure followed and the office served by advisory opinions should know that such a figure of speech is a complete distortion of the facts. In the first place, no advisory opinion will be given by the court except at the conclusion of a proceeding which is essentially judicial in its character. According to the Rules of Court since the beginning, this proceeding has to

⁷ U. S. Treaty Series, No. 778.

⁸ U. S. Treaty Series, No. 811.

⁹ The refusal to give an opinion in the Eastern Carelia Case is not included in this number. It is published in the collection of advisory opinions, however. Series B, No. 5.

be initiated by a "written request," duly authenticated as issuing from the Council or Assembly. The request must contain "an exact statement of the question upon which an opinion is required," and it must be accompanied by all the relevant documents available. Notice of the request is given to all states entitled to appear before the court, and "a special and direct communication" of it is made to those states which may be especially interested. A time-limit is then set within which the court will be prepared to receive written statements from interested states and to hear oral arguments. Any of the sixty-eight states to which the court is open may ask to be heard by the court. A state availing itself of the privilege of submitting a statement or argument, may also comment upon statements or arguments submitted by other states. At the conclusion of this procedure, the full court deliberates, and if and when it decides to give an opinion, advance notice is given to the states "immediately concerned," the opinion is read in open court and is published in a special series of the court's publications. In other words, all the essentials of judicial procedure are scrupulously observed.

In the second place, the court has gone far to assimilate its procedure followed in these cases to that which is followed when a dispute is submitted for judgment. If the request for an advisory opinion relates to a dispute between two or more states, each of the parties to that dispute is entitled to have on the court a judge of its own nationality.¹⁰

I think it is clear, therefore, that an advisory opinion given by the court bears no resemblance whatever to ordinary legal advice which may be given by a counsellor. Whoever heard of an Attorney-General going through a procedure similar to that I have described, before giving an opinion to some authority of his own government? No Attorney-General could function as such if he were limited as the court is limited in giving its advisory opinions. Some of the state courts in the United States have long given advisory opinions. In Massachusetts, the justices of the Supreme Judicial Court are required to give such opinions to "each branch of the legislature, as well as the governor and council," and in the 150 years during which this requirement has existed, they have given more than 150 advisory opinions. No such procedure as I have described for the Permanent Court of International Justice is followed by the justices of the Supreme Judicial Court of Massachusetts, who act without any hearing of persons specially interested; yet in all these 150 years no voice has been heard to say that the Supreme Judicial Court was acting as the Attorney General of Massachusetts. The Commonwealth of Massachusetts has an Attorney General whose office is wholly distinct from the Supreme Judicial Court; and similarly the League of Nations has a *Legal Adviser* who has no connection whatever with the Permanent Court of International Justice, who in fact has never once appeared before the latter.

One other point deserves to be noticed. In all of the twenty-one in-

¹⁰ This is the effect of an amendment to Article 71 of the rules, promulgated on Sept. 7, 1927. Series D, No. 1 (addendum).

stances¹¹ in which the Council has requested the court to give advisory opinions, there has never been an intimation even in whisper that the Council as a body, or that a person sitting on it as a representative of any state, has attempted to influence the court in deliberating on the request. In one case, the court refused to give an opinion as requested; there the request related to a dispute, and when one of the parties to the dispute challenged the competence of the court, it proved to be impossible for the court to comply with the request within the judicial limitations which had been set. Of course, as the statute now stands, the court has power to remove these limitations; but it has shown no disposition to do so, and the amendments to the rules promulgated by the new bench of the court on February 21, 1931, left all of the limitations intact. If the pending revision of the statute should become effective, or if the protocol for American adhesion should come into force, the court would be deprived even of its power to remove these limitations.

If the facts are understood, therefore, it should be beyond refutation that the advisory jurisdiction of the court does not in any way decrease its independence as a judicial tribunal. It constitutes no departure whatever from familiar standards of Anglo-American judicial history; and it makes the court in no way subject to the command or dictation of any other authority. But these conclusions are negative. On the positive side, I think it is not to be contested that because of this jurisdiction the court has played a much larger rôle during the past ten years. Its usefulness in the international life of our time has been more than doubled. In seventeen instances, advisory opinions have been given which have facilitated the solution of as many international problems. The giving of such opinions has been acclaimed very generally by lawyers of other countries, and it seems to me that there is every reason why this feature of the court's activity should be approved by the legal profession in America.

THE LAW APPLIED BY THE COURT

It is one of the astonishing features of the present situation in America that in some quarters hospitality seems to be given to a contention that the court is not independent in its application of law. This contention is sometimes phrased as a suggestion that the court is not free to find the law applicable to a case before it, but is bound to take its law from the League of Nations. Of course any such statement is palpably untrue. Article 38 of the Statute of the Court lays down the sources of the law which the court shall apply, and its provisions have met with such general favor that they were copied *verbatim* in Article 1 of the General Treaty of Inter-American Arbitration, signed at Washington on January 5, 1929.¹² Four sources are listed from which the court must get its law: (1) international conventions

¹¹ One request for an advisory opinion was withdrawn by the Council.

¹² For the text, see 23 American Journal of International Law (Supp. 1929), p. 82.

by which the parties to a dispute may be bound, (2) international custom, (3) general principles of law recognized by civilized nations, and (4) judicial decisions and the teachings of the most highly qualified publicists. Of course the Covenant of the League of Nations falls among the first of these sources for the states which are parties to it, and to the extent to which it creates obligations for such states it is as much a part of existing international law as any other conventional agreement. Fifty-four states members of the League of Nations could not be expected to create a court to ignore that most important instrument.

Nor is there the slightest basis, in the ten years' experience of the court itself, for any reflection on its complete independence in its application of international law. So far as I know, no intimation has been made in any country that the court has ever received any suggestion from an outside source, or has ever been interfered with in any way in its actual deliberations. Of course the judges act under the limitations of their own personalities; no judge can throw off his own personal experience when he dons the ermine; each judge is nurtured in the traditions of some one country, and such traditions may mould his conceptions of international law. But while sitting on the court he is completely independent of the government of his own country, and he is entirely free to exercise his powers "honourably and faithfully, impartially and conscientiously," as his oath requires.¹³ Indeed, in several cases before the court, judges have voted against the contentions of their own governments.¹⁴

GENERAL CONCLUSION

To summarize what I have said, I cannot find any provision in the constitution of the court, nor in the nature of its jurisdiction, nor in its experience in the application of law, to indicate that the court does not possess complete independence for service as an international tribunal. It is as independent as the Supreme Court of the United States; it is no more controlled by the League of Nations because of the method of electing the judges and of paying their salaries, than is the Supreme Court of the United States controlled by our President and Congress because judges are appointed by the President and their salaries are voted by Congress.

If this conclusion is sound, it may then be asked—why have we in America heard so much agitation against the Permanent Court of International Justice, on the ground of its lack of independence? I think the reason is not difficult to find. It is largely because of the failure of our public to understand and to appreciate the League of Nations. The court is related to the League in a very important way. The fact has not been denied by any responsible supporters of American adhesion to the Court Protocol. But

¹³ See Article 8 of the rules. Series D, No. 1 (second edition).

¹⁴ See particularly Advisory Opinion No. 4, in Series B, No. 4, where Judge Weiss concurred in the unanimous opinion which was contrary to the position taken by the French Government.

there are still some people in America who seem to be unwilling to admit that the League of Nations exists. Apparently these persons want to say that the action of our President and Senate in 1920 not only kept the United States out of membership in the League, but also killed the League which other nations had created and which for eleven years they have maintained with increasing usefulness to themselves and to the world. Such persons seem to fear that our government would suffer grievous harm if it had any relations with other states through the League of Nations. Of course that is not the position of the Government of the United States, and it can never be the position of our government. We have learned during this past decade that in our own interest we cannot afford to ignore what other states may attempt to do by organized, coöperative effort; and if it is not ignored, it must even be tolerated, acknowledged and in some cases participated in. The Government of the United States is today preparing for participation in a Disarmament Conference to be held under the auspices of the League of Nations in 1932. Last month it was represented at a Conference on Cheques and at a Conference of Police Officers, both called to meet in Geneva by the Council of the League of Nations; next month it will be represented at a Conference on the Limitation of the Manufacture of Narcotic Drugs, similarly meeting in Geneva under League auspices. The United States is a party today to two of the so-called League of Nations conventions; it has adhered to the Convention on Slavery of September 25, 1926, by which it has undertaken to communicate to the Secretary General of the League of Nations any laws or regulations it may enact in execution of the convention; and it has signed and ratified the Convention on Abolition of Import and Export Prohibitions and Restrictions, of November 8, 1927, which contains a somewhat similar provision. Moreover, this latter instrument envisages for cases of disputes a possible system of advisory opinions to be given by a technical body appointed by the Council of the League of Nations.

These are but a few of the many instances in which the Government of the United States has coöperated with other governments through the League of Nations. Our adhesion to the Court Protocol would involve us in a certain amount of further coöperation of this nature, for which we now have many precedents. Surely this can be opposed only by those who would refuse to recognize the facts in our present international situation. The League of Nations is one of those facts, and I think it is also a fact that no international tribunal wholly unconnected with the League of Nations can be created in the course of our generation. Fifty-four other states of the world, whose coöperation for that purpose is essential, will not join with us in creating a wholly unrelated tribunal.

The Permanent Court of International Justice is not weaker but stronger because it is connected with the League. The connection ought to be welcomed by lawyers who wish to see such an institution a vital force in the life

of our times. To me, it assures greater permanence for the tribunal, a smoother functioning and a far greater influence; and it in no way impairs the court's complete independence for judicial work. If one likes, he may even speak of the court as a "League Court." There are facts which will justify such a description of it. But the American people ought to have those facts straight, and I think the members of this Society should see that the facts are not distorted. We should urge the court's connection with the League as one of the elements of its strength. The establishment of the court is the greatest achievement of our generation for the development of international law. Its success during the past ten years is a triumph of which every society of international law can be proud. The prospect for its future as an independent tribunal administering justice according to law is so bright that it should command the enthusiastic support of every American lawyer.

The PRESIDENT. The discussion of the paper will be led by Pitman B. Potter, Professor of Political Science, University of Wisconsin.

Professor PITMAN B. POTTER (reading). The topic set for discussion this afternoon, or the discussion upon this question which has raged or smoldered along in this country during the past eight years, reflects two preoccupations which determine the formulation of the question itself. Those preoccupations are the ancient Anglo-American prejudice against judicial tribunals which are not allowed to function independently but which are made the tools of some other branch of the government in the discharge of their duties, and a much more recent prejudice prevalent in certain rather limited quarters in this country against the League of Nations. It would be well, before discussing any aspect of the general problem before us, to ask ourselves just how that general question might be reoriented so as to reveal more sharply the issues which are in fact at stake.

In the historic Anglo-American prejudice against courts which serve in their actual operation as tools of the government and not as independent defenders of the liberties of the people under the law of the land, it was the executive arm of the government which was under suspicion. In England it was the Crown and not Parliament which was suspected and condemned for exercising pressure upon judge and judges for the purpose of securing decisions favorable to itself, and the courts in the main did not pretend to have any power to act independently of the behests of Parliament. In this country the courts have played the rôle of checks upon the legislature in the name of the people, upon the majority in the representative body in the name of the majorities in constitutional convention or referendum, though they have also maintained the rôle of defender of the liberties of the people against executive and administrative oppression. In both cases pressure from the executive through appointments or removals, financial influence—salaries or emoluments—and political or personal intimidation, has been feared. Long terms or permanent tenure, popular election, ir-

reducible salaries, and the force of public opinion have been some of the weapons employed to protect the courts against the executive and its power.

When we try to correlate this historic attitude with the situation between the Permanent Court of International Justice and the League of Nations we have some difficulty in making the analogy fit.

Thus in the League or in the international community there is no process of legislation and no body possessing legislative power in any clear and forceful manner; the League Assembly has no such power, and international legislation goes on, in so far as it goes on at all, under League auspices, or in the international community, by the action of member states or the nations of the world in concluding treaties one with another. This obviously renders it impossible to think of the court acting independently of the legislative branch of the international governmental system in reliance upon the constitution-making authority, for here there is no legislation taking place by any process other than that employed in the formation of fundamental constitutional norms; the historic American situation cannot be recognized in this set-up of circumstances.

Again in the League or the international community in general there is no organ possessing executive authority to carry out the law or exercise its power over the component elements in the League or the international community, either the nations or the individuals who make up the nations, or, in turn, to exercise pressure upon the court in order that the court might uphold its actions and lend judicial sanction to trespasses upon the rights and liberties of the peoples. The Council of the League has no such power, and neither the Council nor the Secretariat has enough power or enough occasion to act toward or against a member nation, so to speak, to make it worth while to try to secure court support in such action. Again the traditional Anglo-American fear has no place in this situation because the circumstances are so different from those in the historic national political problem.

If, then, we turn from the possible corruption of the court in its actual discharge of duty by the pressure of legislative or executive arms of the League, seeing that there are no such legislative and executive organs in any serious sense, what have we left? Evidently the fear that the court may be influenced or controlled by "the League" in some vague and general sense, although to what end is not quite clear, in view of the foregoing discussion. Evidently the fear that the Assembly or Council or Secretariat of the League, or perhaps the member states as represented in those bodies, will try to influence and control the court so that it will decide in favor of expansion of authority on the part of these League organs. Perhaps this is a legitimate form of anxiety concerning the independence of the court.

There seem to be two points at which any such attempts to influence the court would reveal themselves, if they existed. In the discussions of the financial affairs of the court at Geneva, as part of the League budget, such

an attitude might be manifest, if it existed, and in the actual practice of the court in interpreting certain international constitutions and statutes any attitude of the court seeking to enhance the powers of "the League" might appear. An examination of the record in these two particulars might yield interesting results.

It is in the Fourth Committee of the Assembly that the budget of the court, as part of the budget of the League, is submitted most clearly to the action of the member states. In the Council, in the Supervisory Commission, and on the floor of the Assembly itself the subject receives some attention, but it is in the Fourth Committee that the members of "the League" have an opportunity to criticize the court budget as is not the case even in the Supervisory Commission. Three conclusions seem to be suggested by the records of discussion of the court budget in the Fourth Committee of the Assembly.

One, in point of principle the court budget is absolutely at the mercy of the Fourth Committee and the Assembly for which it acts. Thus in the Third Assembly, on one occasion when the court budget was under discussion, Col. Ward, for the British Empire, declared that he "was anxious to assure himself that the Court's budget was subject to the control of the Assembly," and the chairman of the committee replied that "the Assembly's control over the budget remained absolute."¹ On another occasion, in a meeting of the Fourth Committee of the Fifth Assembly, the registrar of the court admitted that "the three autonomous organizations of the League (Court, Secretariat, Labor Office) were in the same position as regards financial control."² Thus the court might seem to be subjected, potentially, to absolute financial control by the League.

On the other hand, second, the records of the discussions of the budget in the Fourth Committee also contain repeated entries such as the following: "The Committee adopted, article by article, without any modification, the budget of the Permanent Court of International Justice for the eighth financial period."³ This attitude on the part of the committee is the rule, and the declarations of the principle of absolute control are the exceptions; the principle is sound and is accepted, but it leads to no important action ordinarily.

Third, it is obvious from the records that even in the Fourth Committee it is individual governments, speaking through their delegates, who, in the rare cases where the budget of the court is criticized, are the parties who are doing the criticizing, not the committee, the Assembly, or the League as such. And they are doing it, not so much in behalf of the League, as from highly nationalistic motives of economy. Thus the absolute financial control of the court turns out to rest or be exercised, not by any mythical

¹ Third Assembly, Fourth Committee, 14 IX 1922.

² Fifth Assembly, Fourth Committee, 17 IX 1924.

³ Sixth Assembly, Fourth Committee, 18 IX 1925.

united and inimical League, but by the individual nations who stand back of League and court alike. Financial control of the court by "the League" or its member states acting as a body in Geneva is possible, but it is not, apparently, a fact, on the basis of this evidence.

A study of the first 23 judgments⁴ and the first 18 advisory opinions of the court, given prior to the end of the year 1930, in order to discover further whether the court had apparently been influenced by this potential financial control to employ materials favorable to League authority, or to interpret the materials used in this sense, yields certain interesting results also. They may be briefly summarized in concluding.

The paucity of citations⁵ in the texts of the judgments and opinions of the court is striking. It seems accurate to say that the court expressly cites, in its written pronouncements, the legalistic bases, if any, for its conclusions, not only less frequently than do Anglo-American courts of justice, as would be expected, but also less frequently than Continental civil law courts, and even less frequently than courts of arbitration in the past. This impression is given subject to revision (particularly on the last comparison), and it may not be of tremendous importance, but it appears to have a weakening effect on the pronouncements of the court as read.

In the 23 judgments of the court, the following legalistic bases were cited in actual fact:

1. Covenant of the League.
2. Statute of the Court.
3. Rules of the Court.
4. Armistice Agreement of 11 November 1918.
5. Treaty of Versailles and other Peace Treaties of 1920-23.
6. Mandates under the League.
7. Previous judgments and orders of the Court.
8. Previous advisory opinions.
9. Special international treaties or agreements, and reports of bodies acting by authority of same.
10. General international law.

⁴ Perhaps it would be more accurate to speak of "the first twenty-three items in the series of judgments of the court," for among the items in the series of judgments as numbered and published by the court are several (Nos. 8, 12, etc.) which consist of orders of the court rather than judgments proper. On the other hand, it would be most misleading to confine attention merely to the judgments proper, in view of the importance of the questions dealt with by orders of the court, their contested character, etc. The term judgment is used in the present paper, therefore, to refer to items in the series of judgments as numbered and published by the court.

⁵ There are at issue here two types of citation: first, the citation of a document in support of a conclusion of legal fact or of law, and, second, the reference to a document without reliance upon it or even to set it aside as inapplicable. In the discussion which follows it is the citation of the former type which is significant, though references of the second type, especially refusals to apply a document, may be important also.

11. Judicial decisions in international law.

12. National laws and decrees.

Among these various forms of law cited, Nos. 1, 4, 8, 10, 11, and 12 were cited very infrequently. This would be expected in regard to Nos. 4 and 17 and needs no comment. The infrequent citation of previous advisory opinions of the court may be noted because an opposite condition of affairs would provoke such strong comment. The infrequent citation of the Covenant is rather noteworthy; apparently the court does not, as had been predicted, decide all its cases according to the scripture of the League! And the very infrequent citation of "general international law" (*droit international général*) and adjudicated cases involving that law is extremely striking; in only one case out of 23 (the Lotus case) were such citations found. This fact has little bearing on our present problem, but merits attention from those who pretend to foresee a great development of general international law by the process of adjudication at the hands of the court.⁶

The materials most frequently cited in the judgments were Nos. 9, 2, and 3, 5, 6, and 7. Special international treaty agreements were most frequent of all, the Statute of the court itself next—the court goes upon special international agreements explicitly to some extent in almost every case and upon its own Statute explicitly in over two-thirds of its judgments. The Treaty of Versailles is cited in only about one-fourth of the judgments, although the Treaty of Neuilly and the Treaty of Lausanne arose also in about as many cases. Of course the accident, if accident it be, that brought certain cases and not others before the court, influences to some extent these results, but not, it is believed, so as to falsify the general conclusions to be drawn.

The situation changes somewhat when we turn to the advisory opinions of the court. Since the 13th of August, 1928, the number of judgments has exceeded that of advisory opinions,⁷ and it is highly possible that in the future this disproportion will grow until the advisory opinions constitute a small percentage of court decisions. Up to the end of 1930 the ratio remained about 3 out of 7.

On the other hand, the materials cited in advisory opinions remain substantially the same as in the judgments, whatever one might expect to the contrary, and such changes as are observable seem to go off in the opposite of the expected direction!

The materials actually cited in the opinions are the following:

1. Covenant.
2. Rules of the Court.
3. International Labor Organization Constitution.

⁶ It may be added that general principles of law or principles of general law were mentioned practically not at all in the texts of the judgments (and opinions also, for that matter); as to how far they operated in the minds of the judges of the court is another matter.

⁷ See note 4 above.

4. Treaty of Versailles and other Peace Treaties of 1920-23.
5. Previous advisory opinion of the Court.
6. Special international agreements, and administrative decisions thereunder, by Conference of Ambassadors, *e.g.*

It is interesting to note that in the advisory opinions, No. 1 (the Covenant) was cited even less than in the judgments! On the other hand, the Constitution of the International Labor Organization, a parallel document, came in for quite frequent citation as a result of the fact that three questions of interpretation of that document were explicitly referred to the court. The Statute of the court was not cited once, and the rules only once. The Treaty of Versailles and other peace treaties were cited, like the Covenant, less frequently than in the judgments. By far the most frequently cited material here, as in the judgments, was the special international treaty agreement. Here no more than in the judgments were League documents relied upon by the court to the exclusion of other materials; rather the opposite was the case.

Back of all this, of course, one might inquire whether the court actually decided in favor of the League when questions of relative authority were at stake, or in favor of dominant League Powers in disputes with non-League or only mildly pro-League members, and so decided soundly or unsoundly. To answer the last question would involve a redecision of each of the cases on its merits, something which cannot be undertaken here. On the other points the following facts may be pertinent: in the 23 judgments no questions of relative League authority arose, and few controversies between League and non-League Powers (only cases involving Germany prior to 1926); in five such cases a League member lost to a non-League member three times; exactly the same thing happened in five advisory opinions. Questions of League competence arose in two advisory opinions; both were decided in favor of the League (one against a member, Poland, one against a non-member, Turkey). In the judgments, no question of Labor Organization competence arose, but this question arose on three advisory opinions, and was decided twice in favor of the organization and once against. In the 23 judgments former Allied Powers won two decisions, former Central Powers nine, while in twelve the decision was irrelevant to this distinction; among the advisory opinions four favored Allied Powers, four Central Powers, and ten were irrelevant. Clearly, on the surface little or no pro-League, pro-Labor Organization or pro-Ally bias is noticeable. The size of the court would not necessarily correct nationalistic or pro-League bias on the part of individual judges in controversies where individual national or League policies were involved, because of the dangerous effect of grouping or the formation of blocs among the members in the court, but in point of fact no such effect is clearly shown down to the present time.

The lack of independence of the court on the points and materials examined in this brief paper therefore proves to be a false alarm.

The PRESIDENT. Ladies and gentlemen, the discussion is open to the members on the floor.

Professor JESSUP. Mr. Chairman, may I ask a question? At the close of the meeting this morning Dr. Hill asked a question which was deferred until this afternoon because of the lateness of the hour. If he is here, I should like to refer to it.

Dr. DAVID JAYNE HILL. I entered into no discussion this morning, sir, but propounded a question which would seem to me to be important. I am very happy to be here when that question is answered.

Professor JESSUP. Mr. Chairman, the question that Dr. Hill raised, I believe, was this: He first questioned the terms of the protocol in referring to the exchange of views and to the vote, and then he raised this question: "If the court has no jurisdiction to entertain a request for an advisory opinion, why should the Council request that opinion? And if the Council is not to request the opinion, how can one say that the vote in the Council which is referred to in the protocol is addressed to the question of requesting an opinion of the court?" Is that correct, Dr. Hill?

Dr. HILL. Substantially.

Professor JESSUP. I should like to suggest this: In the proceedings before the Council, described as an exchange of views, the steps might be described as follows:

The exchange of views is primarily designed for the purpose of ascertaining whether an interest of the United States is affected by the question on which it is proposed to request an advisory opinion. The United States might not be aware of the details of the dispute or question which was then before the Council, and would wish to be informed regarding these details in order to ascertain whether its interests were affected. That, I believe, is the purpose of the exchange of views—to ascertain whether or not an interest of the United States is affected—but that is merely one part of the question.

Assuming that an interest of the United States is not affected, the Council must still decide for itself whether, in that particular situation, it desires to request an advisory opinion. That question, under its normal procedure, is decided by a vote. Under the terms of the protocol the United States may participate in that vote even though no interest of the United States is affected.

In the second place, it is possible—and Dr. Hill, I believe, suggested that we should consider this as a legal eventuality or possibility, and not necessarily in the terms of its reality or probability—in the second place, even if an interest of the United States is affected, the United States might have no objection to the request being transmitted to the court. In that case also the Council would proceed to vote in its normal manner whether or not it desired to request an opinion from the court.

In the third place, the exchange of views might bring out that an interest of the United States was affected, and that the United States intended to

withhold its consent from the court's entertaining the request for an opinion if it were transmitted by the Council. Here I go into a realm which I think is in the realm of the improbable but the legally possible. The Council might then say: "Well, we choose to make an issue of this. We choose to bring the matter to the scratch, to find out whether you intend to take the responsibility for preventing the court from entertaining a request to assist in settling this issue. We will, therefore, vote as to whether to request the opinion of the court."

Again the vote of the United States must be counted. It may be overruled if, another possibility, the majority rule is in force. If the vote of the Council then determines that the request should be or is to be transmitted to the court, the Council may transmit the request solely for the purpose of bringing the matter to the scratch, and bringing about this deadlock which is ultimately contemplated in the protocol, and compelling or perhaps inducing—it is not compelling, because the United States need not withdraw—but inducing the United States to withdraw, or creating the opportunity which, in the words of the protocol, would make it natural for the other signatory states to exercise their powers of withdrawal.

It therefore seems to me that there is nothing unreasonable, nothing hard to understand, in the set-up which, on the one hand, permits or contemplates a vote in the Council on the question of transmitting the request, and, on the other hand, preserves the bar to the jurisdiction of the court which is found, in my opinion, in the fundamental acceptance of the fifth reservation, as I tried to point out this morning.

Secretary FINCH. Mr. President, before we again get away from this subject of the Protocol of Accession, I should like to make a suggestion for the approval of the membership in regard to the texts of the documents that we are discussing. Some of the members in the course of the morning have suggested that the discussions could have been followed much better if we had provided the texts of these documents, so that the various clauses referred to could be read. I think that is a good suggestion, but it was not made in time. We printed the English text of the Protocol of Accession in the supplement to the January JOURNAL OF INTERNATIONAL LAW, which I presume most of you have and have perused.

In order that these discussions may be a little more understandable, I suggest that we incorporate in the proceedings the official English text of the Protocol of Accession, and, as it was suggested this morning that there may be some difference from the French text, that we also incorporate the French text in our proceedings, so that when you gentlemen get these discussions, and attempt to recall what has taken place, you will have these texts handy in the same volume for reference.

The PRESIDENT. Do I understand Mr. Finch to put this in the form of a motion?

Secretary FINCH. I so move.

The PRESIDENT. Mr. Finch has made a motion that the relevant documents which he specified be included in the printed proceedings of the meeting.

(The motion was seconded and carried.)

The PRESIDENT. The discussion is open.

Professor HERBERT WRIGHT. Professor Hudson has so ably and convincingly proved the impossible, showing the independence of what he says has been termed by some the League's Court, that I wonder if he would be kind enough to explain how the Council resolution of May 17, 1922, regarding the submission of cases by states which are not members of the League and are not mentioned in the annex to the Covenant, does not prevent the independence of the court from being an actuality. You remember something in that resolution about the acceptance of the Covenant?

Professor HUDSON. What is the question exactly?

Professor HERBERT WRIGHT. The question is how far, if at all, the Council resolution of May 17, 1922, concerning the admission to the court of states which are not members of the League and are not mentioned in the annex to the Covenant—it is rather involved—how far that Council resolution affects the independence of the court in so far as that resolution requires the state in question to accept the Covenant of the League. I have very poorly expressed it, but I presume Professor Hudson understands my meaning.

Professor HUDSON. I see no connection at all between the two. The Council resolution does not require any state that makes use of the court to accept the Covenant of the League of Nations. It is required only that such a state accept the jurisdiction of the court in accordance with the Covenant and the Statute.

Professor HERBERT WRIGHT. Does not the resolution of May 17th require that?

Professor HUDSON. I think not. I have not the text before me, but I feel quite sure of that.

Professor HERBERT WRIGHT. I was under the impression that it did.¹

Professor HUDSON. It requires a state to accept the provisions of the Statute for the determination of that particular case.

The PRESIDENT. Is it the desire of the meeting to discuss Professor Hudson's paper?

Professor HUDSON. Mr. Chairman, I should like to say a word about Mr. Potter's paper. I should like to protest against Mr. Potter's using the tabulated method of baseball scores for the purpose of finding out what a judicial institution of the importance of the Permanent Court of International Justice may do. I think his method is not calculated to produce a true impression. To tell me that a particular document has been cited by the court, when the court is called upon to interpret that document, seems

For the text of the resolution referred to, see *infra*, p. 226

to show nothing so far as the citation goes. Of course the court cites a document if it is called upon to interpret that document. It is one thing to cite a previously decided case. It is quite a different thing to refer to the document which may be relevant to the actual question that has been put. I should also like to ask Mr. Potter if the number of judgments he gives is not a little large. I thought there had been 17 judgments of the court instead of 23. Aside from that question, however, it does not seem to me that we learn anything about what the court does as a consequence of tabulating references to particular documents.

Professor PITMAN B. POTTER. Mr. Chairman, I should be glad to comment on those two questions, if I may.

In the first place, I was led to approach the topic by the method which I employed because I thought that we had had about enough general palaver about the independence of the court in terms of personal opinion, without very much evidence submitted. I say that with all deference to those who had interpreted the various relevant documents, those who had expressed their feelings and their thoughts; but I felt, frankly, that in addition to that type of discussion we might profit by some examination of the facts.

With regard to the frequency or infrequency of citation of a particular document, I think it would be fair to distinguish between two types of treatment. I did not include in my computations cases where a document had been referred to because of an inquiry concerning its meaning, or because it was in some collateral way relevant. I referred to the document only when it had been made the basis, in the context, of a conclusion drawn by the court; it would be freely granted that a collateral reference to a document does not mean anything, or reference to the document because the request for the advisory opinion had related to that document.

As far as the number of the advisory opinions and judgments is concerned, I can say that I was also surprised at Mr. Hudson's figures. What I had done was to take at face value the numbering of the items in the published series of the advisory opinions and the judgments of the court. Now, perhaps they do not know how to number their own advisory opinions and judgments, but I am quite certain that the numbering which I used was the numbering of the court. A number of the judgments were orders, and perhaps hardly deserved to be dignified by the title of "judgments", but that is exactly the treatment which was given them by the court in the numbering of the documents.

Mr. CHARLES WARREN. Mr. President, I have one very brief sentence to give. On the question of the citation of authorities in the judgments of the court, it may be well to recall that John Marshall, in his four most fundamental constitutional cases of *Marbury v. Madison*, *McCulloch v. Maryland*, the Dartmouth College case, and *Gibbons v. Ogden*, cited not one single authority.

Mr. A. H. FELLER. Mr. President, I should like to defend the Perma-

nent Court of International Justice from the charge that it does not know how to number its own judgments. There is a double numbering employed—first, Series A, numbers 1 to 23, and then Judgments numbers so and so. The reason for the duplicate numbering is that in some judgments various proceedings are taken at different stages, resulting, therefore, in more than one decision to one particular case.

Professor QUINCY WRIGHT. Mr. Chairman, I should like to say a word in at least partial defense of Mr. Potter's method. I was very much interested in his somewhat novel approach to the question of the independence of the court. It seemed to me that it is of great importance, in studying the question, to know the kind of materials which the court actually uses in reaching its conclusions.

The statute of the court, in Article 38, recognizes certain sources of law that are available to the court. Those sources include treaties and conventions; international custom; what are called "general principles of law," and finally the statements of authorities and judicial decisions. It seems to me that it would be of considerable interest if one could examine the judgments, and determine the extent to which the court had actually utilized only those types of materials described in Article 38, and the relative extent to which it had used one or the other of those four categories.

I am not certain that that is a thing that could be done. It seemed to me, however, that Mr. Potter's categories did not quite conform to those categories, in fact did not quite conform to any very obvious system. He referred in succession to such things as the Covenant of the League, individual treaties, the statute of the court, the rules of the court, etc. Thus, my criticism of Mr. Potter's method would not be that his examination of the kind of material used by the court was not pertinent, but rather that he did not make a sufficiently careful analysis of those kinds of material.

Professor POTTER. I should like to say one thing with regard to the difference between the two expressions which have been used in discussing this point. I had no thought that in surveying the record of the citations of the court I was necessarily getting at the grounds upon which the members of the court actually based their decisions in their own minds. There is no way by which we can go into their own minds and discover that. It is quite obvious that what I was doing was observing the citations rather than the basis upon which they were actually going in their mental processes. In so far as you may hypothecate a divergence between those two, these observed data, may prove little.

On the other hand, in doing what I attempted to do, I thought that it was very much safer and very much more scientific, if I may use the word, to take the data as they were found empirically, rather than to try to classify them by some *a priori* scheme. It would, of course, have been quite possible to use the four-fold classification of types of material mentioned in the

statute. It would be relatively simple to take these data and classify them in that sense. I am not sure that you would learn any more, if indeed you learned as much, as you do from a primary scrutiny of the data just as they appear. For example, you have in that four-fold classification treaties—international treaties. It is much more important, however, for us in this problem to distinguish between the Covenant and international engagements of very much more special types, or between the International Labor Organization's constitution, or, say, the treaties of peace and subsequent more specific, highly specialized international agreements. It is very significant, it seems to me, that the Covenant is cited so infrequently. Now, if you made a classification of "international agreements," that fact would be lost.

Professor QUINCY WRIGHT. The criticism which I would have is that the neglect to utilize that classification meant that Mr. Potter did not include at all materials which would be in the second or third of those classes. I do not know that the court has ever referred to what might be called international custom. The third category, that is "general principles of law," Mr. Potter did not refer to. I do not know whether the court has used that; but everything Mr. Potter referred to would come in the first or the fourth category.

Professor HUDSON. Mr. Chairman, my objection is to Mr. Potter's failure to distinguish between a citation and a reference. If the court simply refers to a document that is before it, I suppose it does not cite that document. I venture to say that the Covenant of the League of Nations has not been cited once by the court.

I also object to his adding up the scores to see who won and who lost. It sounded to me like a report of a baseball game. I do not know how you would determine that anybody won or lost a case before the court for advisory opinion, and I would have no way of determining that in connection with an advisory opinion the court had decided or given an opinion in favor of or against any state or any group of states.

Professor POTTER. May I put two questions to Mr. Hudson on the last point?

The PRESIDENT. I think that would be a fair continuation of the subject in hand.

Professor POTTER. Is there no possibility of deciding who won or who lost on the question of the entry of Danzig into the International Labor Organization?

Professor HUDSON. No; no possibility.

Professor POTTER. And on the question regarding the scope of the authority of the Council with regard to the boundaries of Iraq?

Professor HUDSON. Absolutely no possibility.

Professor CHARLES G. FENWICK. Mr. Chairman, I would like to raise a question that bears upon the decisions and advisory opinions of the court

as precedents for future action by the court, and to raise it from the point of view of politics, not of law.

I sat through most of the Senate debates in January of 1926, and the impression I had from them was that the question of advisory opinions did not come before the Senate in any clear way so that the decision taken by the Senate in 1926 in any way reflects the sober judgment—if we can use that word—of those who dealt with the question. It was observed this morning that a great many of the Senators were extremely concerned with this question of advisory opinions. They were not concerned in January of 1926, because they did not seem to know the import of what they were voting on. I say it without disrespect to the Senate, because we all know that this issue came up at the very last moment, and was not the phase of advisory opinions that had been under discussion during the previous weeks.

My question is this: Why should the Senate be more concerned over the effect of an advisory opinion as a possible precedent for future action by the court than it is over a decision of the court? Let us take a possible case between Canada and Germany, or Mexico and Germany, or Nicaragua and France; and let us assume that those two countries have submitted their case to the court for a decision. The Senate reserves no right to interfere with that submission. The case goes without consulting the United States. We have no way of preventing the court from rendering a decision in the matter. The court renders its decision, and that decision concerns indirectly the Monroe Doctrine, we shall assume. The United States is powerless to prevent the giving of that decision, and powerless under its resolution of January 27, 1926, to prevent that decision from becoming to some degree a precedent for future decisions of the court, though of course it is clear that we are not bound ourselves by any decision of the court.

Why, then, should the Senate be so alarmed over the possibility of an advisory opinion given by the court in a case between Canada and Germany, or between Mexico and Germany, or between Nicaragua and France? Following the argument of this morning, the advisory opinion will have some value as a precedent. Why should the Senate be so concerned to protect itself against an advisory opinion in which it claims it has an interest, when it has made no effort to protect itself against the decision of the court in which we may have an equal and perhaps a greater interest? That is a question, as I say, of politics bearing upon the mind of the Senate. I should like Mr. Hudson, or someone who has followed the Senate more closely, to give some explanation why there is this concern over advisory opinions when they failed to protect themselves against the force of a decision.

(Secretary FINCH addressed the Chair.)

The PRESIDENT. Unless Mr. Hudson wishes to reply—the question was put to him—Mr. Finch has the floor.

Secretary FINCH. Mr. Chairman, I do not wish to reply to Professor Fenwick, except to a very small portion of what he said. In the first part of his remarks he intimated that the Senate in 1926 had not a very clear idea of advisory opinions, or what it was doing about them. I have not read all the debates, but I have read some of them; and the impression I got was that the Senate knew exactly what it was doing. The provisions of the fifth reservation were the subject of change a number of times to meet the varying opinions of the Senators; and I got the very distinct impression that the purpose of the Senate in drawing the fifth reservation was to give the United States a veto upon the rendering of advisory opinions. I think that the effective incorporation of that intention of the Senate into the terms of the fifth reservation is the very reason why we have had this *impasse* for five years. I think there has been a misunderstanding in Europe as to what the Senate meant and what it was trying to do. It seems to me that if the Senate had meant not to reserve to the United States the right to prevent the court from rendering an advisory opinion, it would not have drafted its fifth reservation in the terms in which it has been drafted, which have made it so difficult for the representatives of the League of Nations to accept it and at the same time preserve unimpaired the right of the court to render advisory opinions.

Professor FENWICK. Would Mr. Finch therefore address himself to the question as to why, if the Senate as a body really knew what it was doing in the matter of advisory opinions, it did not protect itself with equal care against decisions?

Secretary FINCH. I cannot answer that now. I do not think anything on that point is disclosed in the *Congressional Record*. I am simply referring to the impression I got from the *Record* of the intention of the Senate on this particular reservation.

Mr. DENYS P. MYERS. Mr. Chairman, I had a little experience once which I think may throw a little light on Mr. Fenwick's question. It seems to me clear that the Senate viewed an advisory opinion as having an intimate connection with a political case; and what it was trying to do was to defend the United States from being hit by a carom shot from any political question that might come before the Council of the League.

I say that more or less advisedly because some months before that reservation was under discussion in the Senate I missed two trains in discussing it with the man who was the original proponent of it; and in our discussion for about three hours that seemed to be his preoccupation. He felt that any case that came before the court was going to be put as a legal problem, and that even though it might have an influence on the United States or might affect us as an *obiter dictum* or otherwise injuriously, nevertheless that would be an entirely legal decision. As you know, we are a government of laws and not of men, so that objection in that direction would end at that point. But with respect to the advisory opinions, I think the Senate and a good

many others have had an exaggerated idea that the Council of the League is engaged in splitting the political difference between contending political forces in Europe, and we must keep very much away from them; that the advisory opinion was going to be used not in a strictly legal sense, but was going to be part of the hand which a political organ was going to play in a game of, perhaps, diplomatic poker.

I think that is an entire misconception of advisory opinions. The advisory opinions, some eighteen in number at the present time, have, in the case of thirteen, been questions of legal interpretation, usually of a treaty, asked of the Council of the League by another institution or disputant parties. The institution or parties did not know what a treaty meant. If they could find out then they could settle the outstanding question under a rule of law. The Council in some thirteen out of eighteen cases has simply transmitted a question to the court in order to provide a basis of conventional law, thoroughly determined.

In the case of the other opinions, requested, as the registrar of the court says, *proprio motu*, in every case the situation has been this: the Council has had before it, usually under Article 15 of the Covenant, a question involving the conciliation method of settling a dispute. That dispute has been found to turn in the end or at a particular point upon the exact legal significance of a document or some condition. The Council at that point has requested a legal interpretation from the court, and that has been the question on which an advisory opinion has been rendered. In every case, I believe, having the answer to that question, the Council has been able to continue the conciliatory procedure under Article 15 of the Covenant, and to proceed with the settlement of the dispute.

That is not a free political basis. Conciliatory procedure follows a distinct set of rules. There is considerable established procedure under the pacific-settlement system of the League Council. So you have a legal determination coming in to buttress or aid the settlement of a question under that procedure. But the Senate, I think, has felt that that procedure was entirely free and of a political bargaining type. That feeling has been the basis of their objection to the rendering of advisory opinions.

Professor QUINCY WRIGHT. Mr. Chairman, it seems to me that the suggestions Mr. Finch made as to the objective of the Senate in the fifth reservation are so important that they ought not to go by without a little contemplation. If the Senate intended, as I understood Mr. Finch suggested, to kill the institution of advisory opinions altogether, it seems to me they expressed themselves most obscurely. As I read that reservation, it aimed to prevent the giving of an advisory opinion in a case where the United States has or claims an interest; and in the ordinary usage of language that does not suggest to me an intention to kill advisory opinions altogether. I did not have the pleasure of being in person at the debates in the Senate, but I did read them all over; and while a few Senators took this extreme

position, those who sponsored the resolution which prevailed recognized that advisory opinions might under certain conditions be desirable.¹

It seemed to me that the feature which played the largest part in the ultimate insistence upon this reservation was the communication from a distinguished person who was not mentioned by name in the Senate—his communication was introduced by Senator Borah, but I think it is an open secret who that individual was—a former judge of the court, of American nationality. I cannot quote that communication, but the impression conveyed was that safeguards against advisory opinions adverse to the interests of the United States were necessary. We all have available the opinion which Judge Moore had about advisory opinions, because it was published in a public document. It has sometimes been said that Judge Moore was against the institution of advisory opinions; but I perused the document which he wrote in connection with the drafting of the rules of the court, and he certainly does not express any such opinion. The opinion he expressed was that the institution of advisory opinions needed to be secured by certain safeguards. There certainly was no suggestion that they ought to be killed altogether; and in subsequent addresses Judge Moore has expressed exactly that opinion.

Bringing these various data together, I should be glad to have a little more substantiation for Mr. Finch's suggestion as to the extreme intentions of the Senate.

Secretary FINCH. Mr. Chairman, I did not mean to state that the Senate intended to prevent the court entirely from rendering any advisory opinion. I perhaps should have gone on a little farther in my remarks. I meant to say that, in my opinion, the Senate did intend exactly what the wording of the fifth reservation says. It intended to prevent the court, as far as my understanding of the debates goes, from rendering any advisory opinion on a matter in which the United States interposes a veto on the grounds stated in the reservation.

As for the anonymous communication attributed to Judge Moore, I do not recall the exact text, but the wording of the reservation goes much farther than that memorandum suggested. The Senate, after consideration, did not adopt the suggested wording of the memorandum as to advisory opinions, but went farther, and it seems to me from the record, purposely so. The memorandum contemplated that there should be a somewhat less drastic provision as to the effect of an objection of the United States than the provision finally adopted by the Senate.

The wording of the fifth reservation in respect to advisory opinions is so plain and unambiguous that it seems to me to be not even open to interpretation by reference to the Senate debates which preceded its adoption. I am, therefore, convinced that the Senate in 1926 in thus carefully and deliberately drafting the plain language of reservation 5 meant precisely what the

¹ See AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 21, pp. 3-4.

reservation says. What view the Senate may now take is another matter because there is another Senate.

Mr. RICHARD W. HALE. Mr. Chairman, I have listened to this debate so far without anybody's putting a concrete case in which one could imagine that the United States were interested in an advisory opinion. I should like to ask the gentlemen to put concrete cases; and, not to hold back, I should like to put one myself: Supposing that Canada and Mexico should put to the court the question of the pursuit and seizure of the *I'm Alone*, and should ask the court for an advisory opinion upon the behavior of a hypothetical person in an *I'm Alone* case. Would that come within Article 5? At any rate, can we conceive of practical cases which would illuminate Article 5 by coming within it or coming without it? I ask these gentlemen to discuss the matter and put concrete examples.

Professor FENWICK. Mr. Chairman, it seems perfectly clear that the very strong opinions which a member of the court held at the time of our Senate debate in January, 1926, certainly influenced the committee, and led them into a very drastic statement of the attitude of the United States toward advisory opinions. My own conclusions from attending the debates very carefully are, as I said, that the large majority of the Senate were not really interested in that point, and accepted the strong phrasing made by one particular member of the committee, and let that part of the fifth reservation go through without discussion.

In the meantime, opposition to advisory opinions has become part of a national complex. It has become associated in the mind of the Senate with national isolation, and I see no hope whatever of trying to argue the question so long as the complex persists. I therefore wish—and this is *apropos* Professor Borchard's remarks this morning—to suggest that there is no use trying to modify further the Root formula. That goes as far as we may reasonably hope to go. If the Senate cannot see that, we might as well abandon the situation and wait until some resolute force outside of the Senate, in the executive department, pushes the matter by an appeal to public opinion.

I do not think you can possibly reason any longer on advisory opinions before the Senate because of that complex. It now means, "Do you favor the Court and the League and international cooperation, or do you not?" When you reach that issue, it is outside of the realm of any technical discussion of whether or not the United States is protected against advisory opinions in which it has more than an alleged interest.

Mr. MYERS. Mr. Chairman, Judge Moore's name has been brought into this matter, and the implication left that this reservation somehow was dependent upon him.

I think it is correct to state that Judge Moore was not opposed to advisory opinions, but that he interpreted the matter rather as Mr. Wright indicated. The matter of language in those days became very delicate. It

was a matter, not of saying a thing, but of the formula in which it was phrased. I think the truth is that Judge Moore had set down certain ideas, and that members of the Senate, doubtless thinking that they were entirely conveying the idea which Judge Moore had in mind, had "monkeyed" with the language and altered the meaning. I think that is the truth of the matter; and I think it is fair to say so in order to leave Judge Moore's position as it should be.

(Thereupon, at 4.15 o'clock p. m., upon motion duly seconded, an adjournment was taken until 8 o'clock p. m.)

FOURTH SESSION

Friday, April 24, 1931, 8 o'clock p. m.

The evening session was called to order at 8 o'clock p. m., in the Willard Room of the Willard Hotel, President James Brown Scott presiding.

The PRESIDENT. Ladies and gentlemen: The evening session is now open. The first of the two questions on this evening's program deals with "The policy of the United States in recognizing new governments during the past twenty-five years". Mr. Green H. Hackworth, Solicitor for the Department of State, will read the leading paper on this question. May I welcome him with the right hand of fellowship? Exactly 25 years ago, when this Society was being formed, I myself had the honor of holding that post.

THE POLICY OF THE UNITED STATES IN RECOGNIZING NEW GOVERNMENTS DURING THE PAST TWENTY-FIVE YEARS *

BY GREEN H. HACKWORTH

Solicitor, Department of State

American statecraft had its beginnings in efforts to secure the recognition of our own independence. It is not, therefore, surprising that the first Secretary of State, the author of our Declaration of Independence, should have adopted a great catholic policy of recognition. This policy has come to be known as the *de facto* theory as contrasted with the theory of dynastic legitimacy, followed particularly in the Middle Ages and from the 16th to the 18th centuries. On November 7, 1792, Mr. Jefferson, in response to an inquiry from Gouverneur Morris, the American Minister to Paris, as to the course he should pursue with respect to the then recent revolution in France, instructed the latter that, "It accords with our principles to acknowledge any Government to be rightful which is formed by the will of the nation, substantially declared."¹

In a later instruction of March 12, 1793, to Gouverneur Morris, Mr. Jefferson said:

We surely cannot deny to any Nation that right whereon our own government is founded, that everyone may govern itself according to whatever form it pleases, and change these forms at it's own will: and that it may transact it's business with foreign nations through whatever organ it thinks proper, whether King, Convention, Assembly, Commit-

* The writer deems it appropriate to remark that this paper, as its title indicates, does not purport to be other than a review, in a distinctly objective manner, of the historical facts pertaining to the recognition of foreign governments. The statements are merely statements of the *past policy* as enunciated by the government from time to time.

¹ Jefferson, Secretary of State, to Morris, Minister to France, November 7, 1792. MS. Inst., Ministers, p. 215.

tee, President or anything else it may chuse,—the will of the nation is the only thing essential to be regarded.²

From that day to this, that fundamental American doctrine, so succinctly expressed, has been variously repeated, reworded, and applied. The policy of Jefferson was followed literally for at least a half century. As late as 1856, we find President Pierce explaining our attitude toward recognition in almost Jeffersonian terms. With particular reference to Nicaragua, he said:

It is the established policy of the United States to recognize all governments without question of their source or their organization, or of the means by which the governing persons attain their power, provided there be a government *de facto* accepted by the people of the country, and with reserve only of the time as to the recognition of revolutionary governments arising out of the subdivision of parent states with which we are in relation of amity. We do not go behind the fact of a foreign government exercising actual power to investigate questions of legitimacy; we do not inquire into the causes which may have led to a change of government. To us it is indifferent whether a successful revolution has been aided by foreign intervention or not; whether insurrection has overthrown existing government, and another has been established in its place according to preëxisting forms or in a manner adopted for the occasion by those whom we may find in the actual possession of power. All these matters we leave to the people and public authorities of the particular country to determine; and their determination, whether it be by positive action or by ascertained acquiescence, is to us a sufficient warranty of the legitimacy of the new government. . . .³

As a result of our experiences incident to the Civil War, we moved for a time thereafter with a greater degree of caution in the recognition of governments born of revolution, as is shown by an instruction sent by Mr. Seward to our Minister to Peru on March 8, 1866, wherein he stated that

The policy of the United States is settled upon the principle that revolutions in republican states ought not to be accepted until the people have adopted them by organic law, with the solemnities which would seem sufficient to guarantee their stability and permanency. This is the result of reflection upon national trials of our own.⁴

In other words, to the Jeffersonian criteria of consent of the governed Mr. Seward here added a requirement of an "organic law" showing that the new government had been accepted by the people. However, this new emphasis on the expression of the will of the people, resorted to out of an abundance

² Jefferson, Secretary of State, to Morris, Minister to France, November 7, 1792. MS. Inst., Ministers, p. 215.

³ May 15, 1856, Richardson, Messages and Papers of the Presidents, 1856, Vol. V, pp. 372-373.

⁴ Secretary Seward to Minister Hovey, Minister to Peru, March 8, 1866, Dipl. Corresp., 1866, Vol. II, p. 630.

of caution owing to our then but recent experiences, was not destined to become a fixed part of our policy on recognition. The test of acceptance by the people by less positive and less formal means was followed in a number of instances between 1870 and 1895, particularly between 1888 and 1895, in which we instructed our representatives to recognize newly established governments when they were "accepted by the people," without undertaking to specify by what manner such acceptance should be signified. It goes without saying that mutual advantages, political as well as commercial, flow from prompt recognition when it is apparent that the new government satisfies the test of "the will of the nation" as laid down by Jefferson.

EARLY TWENTIETH CENTURY POLICY

In our earlier history we had assumed that a government based on the consent of the governed would desire to observe its international obligations, and rarely expressly made this a prerequisite to recognition. Before the close of the 19th century, however, we had frequently added the express requirement that the new government should show a "due regard for obligations under international law and treaties." In later years, whether as a result of the expansion of American trade and commerce, or of our greater experience in international relations, we became more watchful of the interests of our nationals in foreign countries, particularly in those countries subject to erratic changes of government, and hence generally stipulated as a condition precedent to the recognition of new governments that it should be shown that they were able and willing to honor engagements of their predecessors in power. In some cases such agreements of the overthrown governments were specifically enumerated. Thus, in 1903, before according recognition to the provisional government of the Dominican Republic, we required that government to recognize four specific agreements which had been entered into by the United States with the preceeding government of General Vásquez. In 1911, before our recognition of Haiti, we required that Haiti give proper written assurances of her intention to safeguard American interests in that country, including the settlement of claims for damages inflicted during the revolt by which the government had come into power.

While the policy in more recent years, generally speaking, has been to postpone recognition, as in the position adopted with respect to Colombia in 1900, until it is shown that the *de facto* authorities are (1) in possession of the machinery of the state, (2) administering the government without substantial resistance to its authority, and (3) in a position to fulfill all international obligations and responsibilities of the state arising under treaties and international law, we have not always adopted this exact formula in our instructions regarding the recognition of governments. Frequently we have held that governments were ripe for recognition when they were (1) effectively administering the government and (2) were in a position to fulfill their international obligations. This is well illustrated by the Department's instructions

to the American Minister to Honduras in 1903 in which he was told to recognize

. . . General Bonilla as the President of Honduras without precipitation if he is effectively administering the Government and is in position to fulfill international obligations.⁵

Again, in 1911, Secretary Knox instructed Minister Furniss that if he was

. . . satisfied that the Government of Gen. Leconte is in full possession of the machinery of government with the acquiescence of the people of Haiti and is in a position to meet the international responsibilities he is authorized to enter into full relations with it, and that he may so inform the Haitian minister for foreign affairs.⁶

Occasionally we have closely approached the requirements specified by Seward in 1866. On October 5, 1910, the monarchy of Portugal was overthrown by a *coup d'état*. We recognized the ensuing provisional government when it had been officially proclaimed by the Constituent Assembly. We awaited the due election of a president in Paraguay in 1912 before granting recognition to the new government. Following the abdication of the Manchu rulers of China on February 12, 1912, and the organization of a provisional republican government, we stated in an instruction to the American Minister to China, dated September 20, 1912, that it would be more in accord with established precedents to defer recognition "until a permanent constitution shall have been definitely adopted by a representative national assembly, a president duly elected in accordance with the provisions of such constitution, and the present Provisional Government replaced by a permanent one with constitutional authority."⁷

With the possible exception, however, of these last-mentioned instances, which may be explained by the special circumstances of the particular cases, the policy of recognition prior to the beginning of the administration of President Wilson uniformly followed the fundamental principles laid down by Jefferson in his instruction to Mr. Morris in 1792. The lack of uniform phraseology did not constitute a break in the substantially uniform policy, since these various formulae are, after all, but different methods of expressing the Jeffersonian criteria—the will of the nation substantially declared. Jefferson's statements carried the implication that a government, such as he described, would be in possession of the machinery of government, would possess stability, and would be able and willing to meet its international obligations. Therefore, stipulations to that effect contained in more recent instructions to our diplomatic officers may be regarded as specifically stat-

⁵ Mr. Loomis, Acting Secretary of State, to Minister Combs, Minister to Honduras, April 24, 1903, For. Rel. of the U. S., 1903, p. 579.

⁶ Secretary Knox to Minister Furniss, Minister to Haiti, Aug. 18, 1911, *ibid.*, 1911, p. 290.

⁷ However, this Government recognized China on May 2, 1913, when "the National Assembly . . . convened with a quorum and organized for business by the election of officers." *Ibid.*, 1913, p. 116.

ing conditions which otherwise would have been implied in the principles enunciated by Jefferson.

THE POLICY OF PRESIDENT WILSON

It is a matter of history that the Huerta government in Mexico resulted from a *coup d'état*. Mr. Knox, then Secretary of State, referring to the assumption of power by the Huerta régime, expressed the hope that it was supported by the majority of the Mexican people, and requested specific assurances that certain outstanding questions would be dealt with in a satisfactory manner by the new government. A general promise of friendly settlement of these questions was considered insufficient by Mr. Knox. On account of the assassination of Madero, and the delay in making the specific promises requested by Mr. Knox during the closing days of President Taft's administration, as well as other considerations, Huerta was not recognized by that administration.

Within little more than a week after President Wilson's inauguration he announced, on March 11, 1913, certain principles on which he stated would be based our future policy in regard to Latin American countries. Among other things, he stated that coöperation is possible only when "supported at every turn by the orderly processes of just government based upon law, not upon arbitrary or irregular force"; that just government "rests always upon the consent of the governed," and that "we can have no sympathy with those who seek to seize the power of government to advance their own personal interests or ambition." He also stated that we should prefer "those who act in the interest of peace and honor, who protect private rights, and respect the restraints of constitutional provision." On March 11, 1913, the same day the President issued this statement, Mr. Bryan, Secretary of State, sent an instruction to the American Ambassador at Mexico City, in which he stated that

the Department asks nothing less than an unequivocal commitment on the part of the administration at Mexico City to the effect that all American claims growing out of disturbances in Mexico shall be submitted to and be adjudicated by an international commission.⁸

The Huerta régime desired to postpone such arrangements until after its recognition by the Government of the United States. Later, in the summer of 1913, the President sent Mr. Lind as his personal representative to Mexico under instructions to make four proposals to the provisional government, first, that there should be an immediate armistice, second, that free elections should be held, third, that Huerta should consent not to appear as a candidate for the presidency, and fourth, that all parties should pledge themselves beforehand to abide by the results of the election. These conditions were rejected by the Mexican Foreign Office, for which reasons, and the fact

⁸ Secretary Bryan to Mr. Henry Lane Wilson, American Ambassador to Mexico, March 11, 1913, *ibid.*, 1913, p. 943.

that Huerta had meanwhile declared himself dictator, President Wilson refused to recognize the Huerta régime.

Subsequently, we informed Carranza that we were in sympathy with the main purposes of the Constitutionals in Mexico and stated that the manner and spirit in which the Constitutionals dealt with the three problems of, (1) the treatment of foreigners, their rights and property, and the treatment of international obligations of the government which had been superseded, (2) the treatment of political and military opponents, and (3) the treatment of the Roman Catholic Church and its representatives, would influence us in granting or withholding recognition. Carranza expressly undertook, first, to honor all contracts and obligations, second, to protect foreign life and property, and third, to make indemnity for injuries caused by the revolution, and subsequently, in an interview with the press, stated that he would allow religious toleration to prevail as it had in the past, and that popular elections would be held upon the restoration of peace. On the same day on which this statement was made, President Wilson accorded recognition to the Carranza government as the *de facto* Government of Mexico.

In an instruction dated September 12, 1913, to the American Minister at Santo Domingo, Mr. Bryan stated with respect to the revolution then under way that "should the revolution succeed, this Government, in view of the President's declaration of policy, would withhold recognition of the *de facto* government." On September 19, 1913, the minister reported that the leaders of the revolution had agreed to suspend offensive operations and to employ none but constitutional methods. Approximately a year later, August 28, 1914, Dr. Ramón Báez, agreed upon by the leaders of all parties, was inaugurated as provisional president, and was promptly recognized by this Government.

POLICY TOWARD CENTRAL AMERICAN CONVENTIONS UNDER THE TREATIES OF 1907 AND 1923

Our policy with regard to the recognition of the five Central American States,—Costa Rica, Guatemala, Honduras, Nicaragua and El Salvador,—has been in harmony with the policy enunciated and adopted by those countries themselves in the Treaties of Peace and Amity of 1907 and 1923, both concluded in Washington. On December 20, 1907, the Central American States concluded an Additional Convention to the General Treaty of Peace and Amity providing that

The Governments of the High Contracting Parties shall not recognize any other Government which may come into power in any of the five Republics as a consequence of a *coup d'état*, or of a revolution against the recognized Government, so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country.⁹

⁹ Article I, *ibid.*, 1907, Pt. II, p. 696.

When the Central American Republics met in Washington in December, 1922, they again pledged themselves by Article II of the General Treaty of Peace and Amity not to recognize

. . . any other Government which may come into power in any of the five Republics through a *coup d'état* or a revolution against a recognized Government, so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country. And even in such a case they obligate themselves not to acknowledge the recognition if any of the persons elected as President, Vice-President or Chief of State designate should fall under any of the following heads:

(1) If he should be the leader or one of the leaders of a *coup d'état* or revolution, or through blood relationship or marriage, be an ascendant or descendant or brother of such leader or leaders.

(2) If he should have been a Secretary of State or should have held some high military command during the accomplishment of the *coup d'état*, the revolution, or while the election was being carried on, or if he should have held this office or command within the six months preceding the *coup d'état*, revolution, or the election.

Furthermore, in no case shall recognition be accorded to a government which arises from election to power of a citizen expressly and unquestionably disqualified by the Constitution of his country as eligible to election as President, Vice-President or Chief of State designate.¹⁰

While the non-recognition of governments coming into power by force does not come within the realm of modern international law or of the policy generally followed by the United States, it was expressly stipulated by these conventions as the basis of any future recognition of governments among those five Central American States, and we, although not a party to the conventions, have supported the agreements and have faithfully observed their provisions. We severed diplomatic relations with the Zelaya government in Nicaragua on December 1, 1909, because, among other reasons, Zelaya had "repeatedly and flagrantly violated the provisions of the 1907 Conventions." He resigned on December 16, 1909, and we subsequently recognized the provisional government of President Estrada as the *de facto* Government of Nicaragua, but only after receiving assurance from President Estrada that he would hold elections in conformity with the Nicaraguan Constitution. We refused to recognize in 1917-1918 the Costa Rican government formed by Tinoco, who had overthrown by force the government of President Gonzales.

When the presidential term of Señor Lopez Gutiérrez of Honduras expired on February 1, 1924, Congress had not succeeded in naming a new President and a revolution was imminent. Lopez Gutiérrez declared himself dictator and continued to govern after the expiration of his legal term. The Department of State thereupon notified him that it did not recognize his government as the *de jure* Government of Honduras, and the American Min-

¹⁰ Conference on Central American Affairs, December 4, 1922-February 7, 1923, Govt. Printing Office, 1923, pp. 288-289.

ister in Tegucigalpa was instructed to have only informal intercourse with the authorities. During the revolution, Lopez Gutiérrez died and was succeeded by another dictator who, in turn, was removed by revolutionists, and a provisional government was formed with General Tosta as President. The United States continued to withhold recognition pending the constitutional reorganization of the government, announcing at the same time that General Carias, the leader of the revolution, would not be recognized if he were elected President. In December, 1924, elections were held resulting in the election of Paz Barahóna as President. Upon his assuming office on February 1, 1925, the United States formally recognized him as President of Honduras. In 1926 we refused to recognize the government of Chamorro, who came into power by a *coup d'état* in Nicaragua. We took the same position with respect to the leader of the recent revolution in Guatemala who set himself up as provisional president in 1930. He thereupon tendered his resignation, and Señor Reina Andrade, who was subsequently chosen as provisional president according to constitutional procedure, was recognized.

It has been the point of view of this Government that it is "for our interests" as well as for the interests of these countries themselves "to have peaceful, prosperous, and progressive Republics in Central America." We realize, as President Taft aptly stated, that

In very many cases . . . revolutions in the Republics in question have no basis in principle, but are due merely to the machinations of conscienceless and ambitious men, and have no effect but to bring new suffering and fresh burdens to an already oppressed people.¹¹

It is impossible to estimate the number of revolutions which may have been prevented by this policy of recognizing only constitutional régimes in these Central American States. The discouragement of politically ambitious leaders from instigating and promoting a revolution is of infinitely more value than the suppression of one after the destruction of life and property and the disorganization of governmental processes have taken place. Secretary Stimson, in his address before the Council on Foreign Relations, New York City, February 6, 1931, stated:

Since the adoption by Secretary Hughes, in 1923, of the policy of recognition agreed upon by the five republics in their convention, not one single revolutionary government has been able to maintain itself in those five republics. Twice, once in Nicaragua and once in the case of Guatemala, just described, a revolutionary leader has succeeded in grasping the reins of government for a brief period. But in each case the failure to obtain recognition has resulted in his prompt resignation, on account of his inability to borrow money in the international markets. Several times within the same period a contemplated revolution has been abandoned by its conspirators on the simple reminder by a minister from this country or one of the other republics that, even if they were successful, their government would not be recognized; and undoubtedly

¹¹ Message to Congress, Dec. 3, 1912, United States Foreign Relations, 1912, p. xiii.

in many more cases has the knowledge of the existence of the policy prevented even the preparation for a revolution or *coup d'état*. In every one of these cases the other four republics have made common cause in the efforts of the United States to carry out their policy and maintain stability. When one compares this record with the blood-stained history of Central America before the adoption of the treaty of 1923, I think that no impartial student can avoid the conclusion that the treaty and the policy which it has established in that locality has been productive of very great good.

WAR AND POST-WAR PERIOD

The recognition of a government presupposes the existence of a state. For the existence of a state it is elementary that there should be a people occupying a fixed territory, bound together by common law, habits and customs into one body politic, and exercising through the medium of an organization the usual governmental functions. As a result of the World War, many new states and governments sprang into existence, and were recognized by the United States when it appeared that they owed their existence to the will of the people and gave promise of permanence and ability and willingness to assume their places in the family of nations. Thus, after assurance by Ambassador Francis, March 18, 1917, that the provisional government of Russia, which was established on the overthrow of the Imperial Government, was based on the consent of the governed, that it would vigorously prosecute the war on the side of the Allies, and that our recognition would have a salutary moral effect, and the receipt on the same day from the Russian Ambassador in Washington of assurances from the Minister for Foreign Affairs that the new government would continue to respect international undertakings made by the fallen régime, we recognized that government on March 22, 1917. On September 3, 1918, the Czechoslovak National Council, representing the people of Czechoslovakia who had taken advantage of the opportunity to establish their position as an independent nation, was recognized as "a *de facto* belligerent government clothed with proper authority to direct the military and political affairs of the Czecho-Slovaks." This recognition might be regarded in some respects as an anomaly in international law, since it appears from an official report of the historical events in the Czechoslovak territories and from an opinion of the Legal Service of the Reparation Commission issued February 16, 1921, that the Czechoslovak State as such did not come into being until October 28, 1918.¹²

The Kingdom of the Serbs, Croats and Slovenes was recognized by this Government on February 7, 1919, although its territory had not been finally delimited. In order that it might not be contended that we had recognized territorial claims or prejudiced the rights of other people as to territory in dispute, we expressly stipulated that in taking such action the United States recognized "that the final settlement of territorial frontiers must be left to

¹² Reparation Commission, Annex No. 766 c.

the Peace Conference for determination according to the desires of the peoples concerned."

We declined to recognize the independence of Georgia and Azerbaijan because, as stated by Mr. Polk, Acting Secretary of State, in an instruction to the American Mission to Paris January 26, 1920, it was deemed unnecessary and unwise to grant political recognition to those Russian border countries whose independence had not theretofore been recognized. The Acting Secretary stated that he was impelled to this view by the belief that a divided and weakened Russia would fall more easily a victim to unfriendly domination, whereas a united Russian democracy, strong in resistance but indisposed to aggression, would be a factor for world stability and peace. He felt that the encouragement which might be derived from political recognition was not sufficiently important to outweigh the prejudice to ultimate Russian unity or the disadvantage of giving to any local or adventurous politicians the moral commitments implied by the political recognition of the governments that had been formed.

In explaining our recognition of Latvia, Estonia and Lithuania in July, 1922, we stated that

the United States has consistently maintained that the disturbed condition of Russian affairs may not be made the occasion for the alienation of Russian territory, and this principle is not deemed to be infringed by the recognition at this time of the Governments of Estonia, Latvia and Lithuania, which have been set up and maintained by an indigenous population.

In announcing these recognitions to representatives of the press, the Department stated that it took cognizance of "the actual existence of these Governments during a considerable period of time and of the successful maintenance within their borders of political and economic stability."

RECENT POLICY

During the post-war period, the policy of this Government with respect to recognition of new governments has followed closely the principles laid down by Jefferson. In the recent cases of Argentina, Peru, Bolivia, Brazil and Panama, Secretary Stimson recognized the new governments as soon as he was assured (1) that they were in control of the administrative machinery of the state; (2) that there was no active resistance to their rule; and (3) that they were willing and apparently able to fulfill their international obligations. There has been no change in policy with regard to Central America since 1907. The policy was inaugurated during President Roosevelt's administration and has been followed by each succeeding administration.

If any feature of our policy on recognition has had greater emphasis than others it would seem to be the requirement that a new government, before it can claim the right to recognition, should show evidence of ability and willingness to perform its international obligations. If it is unable to

perform such obligations, it has not reached that degree of stability which other Powers are entitled to expect before entering into international relations with it. If, on the other hand, it is able but is unwilling to perform its obligations, it has failed to adopt that standard of international conduct which is supposed to characterize the relations between states.

We have consistently refused to recognize the present régime in Russia because, among other things, of its failure to assume responsibility for its international obligations. The position of this Government was clearly and concisely stated by Secretary Hughes on July 25, 1923, when he stated that

. . . while a foreign régime may have securely established itself through the exercise of control and the submission of the people to, or their acquiescence in, its exercise of authority, there still remain other questions to be considered. Recognition is an invitation to intercourse. It is accompanied on the part of the new government by the clearly implied or express promise to fulfill the obligations of intercourse. These obligations include, among other things, the protection of the persons and property of the citizens of one country lawfully pursuing their business in the territory of the other and abstention from hostile propaganda by one country in the territory of the other. In the case of the existing régime in Russia, there has not only been the tyrannical procedure to which you refer, and which has caused the question of the submission or acquiescence of the Russian people to remain an open one, but also a repudiation of the obligations inherent in international intercourse and a defiance of the principles upon which alone it can be conducted.

The obligations of Russia to the taxpayers of the United States remain repudiated. The many American citizens who have suffered directly or indirectly by the confiscation of American property in Russia remain without the prospect of indemnification. . . .

. . . We would welcome convincing evidence of a desire of the Russian authorities to observe the fundamental conditions of international intercourse and the abandonment by them of the persistent attempts to subvert the institutions of democracy as maintained in this country and in others . . .

and again on December 18, 1923, when he announced to the press that

. . . The American Government, as the President said in his message to the Congress, is not proposing to barter away its principles. If the Soviet authorities are ready to restore the confiscated property of American citizens or make effective compensation, they can do so. If the Soviet authorities are ready to repeal their decree repudiating Russia's obligations to this country and appropriately recognize them, they can do so. It requires no conference or negotiations to accomplish these results which can and should be achieved at Moscow as evidence of good faith. The American Government has not incurred liabilities to Russia or repudiated obligations. Most serious is the continued propaganda to overthrow the institutions of this country. This Government can enter into no negotiations until these efforts directed from Moscow are abandoned.

It will be seen from these statements by Secretary Hughes that this Government considered the present régime in Russia deficient in its observance of the fundamental conditions of international intercourse in three respects, namely:

(1) Its failure to accord to the persons and property of foreigners within its jurisdiction that degree of respect and protection required by international law;

(2) Its failure to respect the international obligations of preceding governments; and

(3) Its failure to respect the right of other nations to develop their institutions and to conduct their internal affairs without interference or control by other states.

The PRESIDENT. The discussion of the paper will now begin, by Professor Edwin D. Dickinson, of the University of Michigan Law School.

PROFESSOR EDWIN D. DICKINSON. Mr. President, ladies and gentlemen: We have been privileged to listen to an excellent address by Mr. Hackworth on "The Policy of the United States in Recognizing New Governments During the Past Twenty-Five Years." I am asked to open a discussion on the subject of this address. I venture to approach the subject from the viewpoint of one who is interested primarily in the relation between recognition policy and the processes of international intercourse and international law.

In any discussion of recognition policy from the international lawyer's viewpoint, it is well to begin by taking some account of the function of recognition in international society. There is nothing quite comparable to international recognition in any national or local society with which we are familiar. Indeed the idea of recognition has no place in a well-organized society. It is chiefly because the community of nations is a very loosely organized community that recognition has such important legal and political consequences. In such a community, normal and orderly relationships among the members depend upon recognition. Neither states nor the governments which speak for states are in normal relationship until recognition has been forthcoming.

It is primarily because recognition serves in the international community as a somewhat unsatisfactory substitute for the cement of effective political organization that recognition policy acquires such importance. It may be granted that there is no legal right to recognition and correspondingly that there is no legal duty to recognize. Nevertheless, in the loosely organized society of states, the withholding of recognition from an established government entails the gravest political responsibilities. To withhold recognition from such a government under any but the most extraordinary circumstances is to obstruct the avenues of normal international intercourse and to thwart the processes of orderly international adjustment. It is a

form of intervention in the internal affairs of another state which is only relatively less disturbing to international law and order than intervention by force.

It follows that the policy with respect to political recognition which is most conducive to orderly international intercourse, and which serves best the national self-interest as well as the interest of international society, is precisely such a policy as Mr. Hackworth has described in outlining the historic policy of the United States. It is a policy which makes for the prompt recognition in each instance of the established *de facto* government. It is a policy which seeks, as consistently as may be, to keep recognition in the closest possible accord with the facts of international life.

There is no time to review the precedents in opening this discussion. My own inclination would be to shift the emphasis a little from the point at which Mr. Hackworth left it. It is true that the historic policy of the United States has stressed, first, the requirement of effective *de facto* control, and second, the requirement of capacity to perform international obligations. Mr. Hackworth seemed a little inclined to stress the latter requirement and in very recent years the emphasis has perhaps been placed there a little more than formerly. It is my impression, however, that the United States has generally assumed that a government which has acquired effective control with the consent or acquiescence of its people is necessarily the government which is competent to discharge international obligations. I would stress a little more the first requirement; but the difference in emphasis is perhaps a matter of secondary importance.

It is of primary importance that there have been but two noteworthy departures from this historic policy since the United States became an independent nation. No great significance need be attached to what appear to have been departures during the Civil War, since they were due to the exigencies of an exceptional situation and were soon abandoned. The policy followed since 1923 with respect to the five Central American Republics has been applied in a limited area and is based upon a treaty between the five republics. The two departures which are noteworthy have been, first, the policy initiated by President Wilson in 1913 in refusing to recognize the government of Huerta in Mexico, and second, the policy initiated by President Wilson and continued by succeeding administrations in withholding recognition from the government of the Soviets in Russia.

With these two notable exceptions, it has been the consistent policy of the United States, in the words of the present Secretary of State, "to base the act of recognition not upon the question of the constitutional legitimacy of the new government but upon its *de facto* capacity to fulfill its obligations as a member of the family of nations." Thus the policy of the United States from the beginning has been conspicuous for its repudiation of legitimacy as a condition of recognition, for its insistence that recognition should march in step with the facts, and for its farsighted emphasis upon the

importance of regularized and orderly intercourse among those governments which are competent to speak for the members of international society.

Let us look for a moment at the two noteworthy departures from historic policy. It is not to be doubted that President Wilson's departure in 1913 was inspired by idealistic considerations. He saw friendly countries torn by futile internal strife which was disturbing in its effects externally as well as internally. He strove to stabilize external relations by making recognition a reward for internal stability. His policy was foredoomed to failure and its repudiation by the present administration of the United States is a welcome return to sound principles.

With respect to Russia, it may be granted that President Wilson's decision to withhold recognition in 1917 was justified by the conditions then prevailing. The world was still at war. The Soviet Government was negotiating a separate peace. Its stability was by no means assured. Its capacity and even its will to respond to international obligations were at least doubtful. In 1917 and the troubled years immediately following there were cogent reasons for delaying recognition of the *de facto* government of Russia.

Surely, however, the opportunist policy of those troubled years has long since lost its vitality. Surely where foresight proved an unreliable guide more than a decade ago, hindsight has now indicated sufficiently the error of our course. The continued withholding of recognition from the *de facto* government of the great state of Russia can no longer be reconciled with the best traditions of American foreign policy. The time is ripe, if not overdue, for a return to sound principles.

President SCOTT. Hear! Hear!

Professor DICKINSON. I hold no brief for the Soviet system in Russia. There is much about it that I admire as little as most members of this Society. But for more than thirteen years the Soviet Government has been the *de facto* government of the great state of Russia. It is irrelevant that few in America admire the system or the economic theories upon which it is based. For more than thirteen years the Soviet Government has commanded the enthusiastic support of a militant minority of the Russian people and has compelled the acquiescence of the rest. It is irrelevant that this is in substance a form of dictatorship. For more than thirteen years the Soviet Government has represented Russia in the family of nations and has conducted negotiations with a steadily expanding group of states, has made treaties, and has participated in conferences. It is irrelevant that its avowed understanding of important conventional and international obligations is different from ours.

Judge John Bassett Moore, in a recent address before the Association of the Bar of New York City, has epitomized United States experience in the application of its traditional recognition policy so admirably that I venture, with your permission, to quote from his remarks. Judge Moore

brands the notion that recognition of a government implies approval of its constitution, its economic system, or its general course of conduct as a "preposterous and mischievous supposition." He reviews the governments with which the United States has established diplomatic relations in the past as a "motley procession," including "governments liberal and governments illiberal; governments free and governments unfree; governments honest, and governments corrupt; governments pacific and governments even aggressively warlike; empires, monarchies, and oligarchies; despotisms decked out as democracies, and tyrannies masquerading as republics—all representative of the motley world in which we live and with which we must do business."

Judge Moore's review is a striking and effective summary of the historic recognition policy of the United States in operation. This policy has brought satisfactory results for 140 years. It has made the United States a leader among those nations which are committed by self-interest and by sound tradition to the promotion of orderly international relationships.

The passages which Mr. Hackworth has quoted from the pronouncements of Mr. Secretary Hughes are possibly a little confusing to students of international law. It is not clear that Secretary Hughes was denouncing the Soviet Government as incapable of discharging or as generally unwilling to discharge international obligations. It is not clear that there has existed such an incapacity or general unwillingness. The Soviet Government has given a demonstration, if I may venture a personal opinion, of rather bad manners in the conduct of international relations. It may be doubted whether we shall improve its manners by withholding political recognition. It has some understandings of international obligation with which the United States is unable to agree; but it is by no means unique among governments in that respect. A considerable part of the civilized world has found a way to deal with it through the normal processes of international intercourse. It is of the utmost importance that there should be orderly intercourse between the United States and the State of Russia which only the Soviet Government is competent to represent.

It appears, therefore, that the case of the United States against Russia is not a case founded upon refusal to respond to international obligations generally, but a case concerning particular obligations. The policy best calculated to promote a settlement of these obligations is a policy which makes discussion and negotiation possible, not one which closes the door to all discussion. The United States at the present time is getting nowhere with respect to the solution of its Russian problems. There is at least a possibility that it may get somewhere if it returns to its historic recognition policy.

It is submitted that the principles upon which the United States has acted in the past have the same validity in 1931 which they had in 1791. It is just as true now as it was then that the most effective way to settle

differences with respect to confiscated property, repudiated debts, or revolutionary propaganda between the peoples of two great countries is through the normal and orderly intercourse of those agencies of government by means of which international business is usually done and in the way in which international business is usually done. Even such mundane matters as trade in manganese or sausage-casings may be settled most satisfactorily in this way. No other position accords so completely with the historic policy of the United States in the recognition of new governments which Mr. Hackworth has outlined for us here tonight in such admirable and satisfactory fashion.

The PRESIDENT. The discussion will be continued by Mr. Arthur K. Kuhn, of the New York Bar.

Mr. KUHN. Mr. President, ladies and gentlemen: I think we have all been very much enlightened by Mr. Hackworth's admirable paper and also by the comment of Mr. Dickinson. I have no important differences of opinion with the principles announced by Mr. Dickinson, and I am a believer in the Jeffersonian policy of recognizing the *de facto* situation surrounding new governments; but it seems to me that it is of importance to distinguish between the relationship which the facts bear to the *internal* affairs of a state, from that which concerns some particular foreign nation like our own, whose particular *international* interests and rights are at stake.

I quite agree that it makes very little difference whether we ourselves approve of the principles which have been announced as those of the new unrecognized government. If it desires to abolish private property, if it desires to set up some particular form of religion or declare that it has abolished all religion, it is no concern of ours so far as its internal affairs are concerned; and Judge Moore succinctly, clearly, unanswerably stated the rule on that subject. But there is also the external view of recognition. There are interests of foreign governments, such as our own, which are brought into jeopardy by what might be otherwise a purely internal policy. It is this which I think is of great concern to us in the United States in regard to the recognition of Russia. We are informed that some \$450,000,000 of property of American citizens has been confiscated or destroyed. In addition, loans placed since the first revolution of 1917, amounting to some further \$300,000,000 have been repudiated by the government; making in all a neat total approaching \$800,000,000 of American interest which I believe that successive Secretaries of State should be vitally interested in protecting if they can.

As has been indicated by the title of Mr. Hackworth's address and by his treatment of it, recognition is a matter of policy. There is no international right of any new government to be recognized, and there is no international obligation of any other nation to accord recognition, while we all agree that recognition should not be unreasonably withheld, or withheld on the ground of some internal policy of the new government.

I do not wish to discuss the propriety of the recognition of Soviet

Russia; but I think that it is of great importance that attention should be drawn to the distinction between internal and international standards as well as to a further consideration. The question of recognition is like the head of Janus. It looks backward as well as forward. You have the *respice* and the *prospice*. The reason why Janus in this instance happens to be an apposite reference is because of the doctrine known to international lawyers as the retroactive effect of recognition. Recognition does not mean merely that you have extended the hand of international fellowship to a new government, and will continue to carry on diplomatic relations, friendly relations, from the time of recognition. It is that, but it is something plus, something else, namely, that you, by recognition, accord recognition from the beginning of the revolution, even though that would go back, as has been indicated in the case of Russia, more than thirteen years; and it would confirm as acts of state all the acts of confiscation or "nationalization" which have been performed by that government affecting American property.

So much for one phase of the subject under discussion.

There is another phase which I desire to bring to your attention which has not been mentioned this evening; and that is the relationship between friendly governments with regard to an unrecognized armed force in the field against one of them; or, in other words, the proper relationship which a nation such as the United States should have with a friendly nation, let us say some Latin-American country, where a rebellious force has taken the field against the established government.

Under the joint resolution of Congress of 1922, the President is empowered to maintain an embargo upon the exportation of arms and munitions which might reach forces fighting against the recognized government. Secretary Stimson, in his speech of February 6th of this year which has been referred to by Mr. Hackworth, tells us that, acting under this resolution, the United States, in 1929, not only maintained an embargo on all arms and munitions which might reach those in charge of the insurrection in Mexico of that year, but that we permitted the sale, and ourselves as a government sold, arms and ammunition to the established government of Mexico. I do not wish to be understood as questioning the wisdom of this action in the particular instance; but I do call attention to the danger of continuing such a policy unless coupled with an equal embargo upon the sale of arms and munitions to the recognized government after an armed conflict has broken out. Neutrality in fact requires no less, even though one of the parties has not been recognized.

Judge Moore, in January of this year, in his Bar Association address, pointed out that the supplying of arms to one of the parties is in effect participating in the conflict. The danger of not maintaining an even balance, once a conflict is waging, was clearly demonstrated in the recent revolution in Brazil, when, two days after the embargo was declared against the export of arms to the rebel forces, the recognized government fell, and the rebels

became the government of Brazil. The convention of Havana of February 20, 1928, between the United States and twenty Latin American Republics, does indeed bind us to forbid the traffic in arms except when intended for the government; but I do not read that treaty as compelling us to supply arms to the recognized government if we choose not to allow export to any of the contending forces. I do not intend any criticism of the act of the United States Government in the particular case, as that is not the subject under discussion; but I do recommend the adoption of an executive and legislative policy which will allow us to maintain an actual neutrality, even though technically there is no state of war. The traffic in arms internationally is at best to be frowned upon by the most enlightened public opinion of our day. The course which I have ventured to put forward is, I believe, in line with our declared principles of non-intervention in domestic affairs.

The PRESIDENT. Is there a desire for discussion from the floor by any member in regard to one or the other papers?

Professor ELLERY C. STOWELL. I should like to move that we have the other paper, and have the discussion after that. The subject is so vital that I am sure it will be taken up very actively afterward.

The PRESIDENT. If there be no objection, we will pass to the next paper, and reserve discussion at the end.

The PRESIDENT. The next paper is "The legal position of war and neutrality during the last twenty-five years," by Charles E. Martin, Professor of Political Science, University of Washington, Seattle. Professor Martin has traveled exactly 3,000 miles to be with us tonight; and I hope that he will find us all in a receptive position, so that none of his paper will have to be omitted which he considers of value to lay before this assembly.

Professor CHARLES E. MARTIN. Mr. President and members of the Society: I realize that this subject has difficulties, and I realize also that the hour is late. So, in spite of the fact that I have come 3,000 miles, I shall do what I can to dispose of the paper as rapidly as possible.

THE LEGAL POSITION OF WAR AND NEUTRALITY DURING THE LAST TWENTY-FIVE YEARS

BY CHARLES E. MARTIN

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The members of our Society, in celebrating the 25th anniversary of its founding, are not interested in a detailed chronicle of facts and events relating to war and neutrality which have transpired during the last quarter of a century, but we are rather interested in the fruit of the period. What, after the lapse of a quarter-century—in many ways the most significant in the history of war and neutrality—are the differences in the legal concepts of war and neutrality which have come about? Has so much war activity, and

so much discussion regarding war and neutrality, resulted in any changes in their legal positions, or have their legal aspects remained unaffected by the events of the immediate past?

It should be borne in mind that much of the discussion regarding war as an institution, or war as a policy of government, or of the good or evil effects of war, do not relate to its legal position. The causes, consequences, and the permanent effects of war, for example, are so widespread that they extend far beyond the limits of a legal discussion. Questions of policy, of administration, and of ethics in connection with war are given such prominence in our discussions that its legal position is often obscured, if not entirely overlooked. It is in these fields that the greatest changes have taken place, and it is altogether too easy to regard changes in policy, administration, and ethics as assimilating to themselves fundamental changes in law as well. What are the characteristics of the past quarter-century as regards the legal aspects of war and neutrality? What changes have grown out of these considerations? And what elements of war and neutrality remain substantially the same? We will consider first the legal notion of war.

I. THE LEGAL POSITION OF WAR

1. *The definition of war*

The definition of war, from a legal standpoint, has been altered little, if any, by the events of the past 25 years. In other words, society understands the horrors of war, and regrets them, and takes steps to prevent them, or at least to ameliorate their effects. But it also recognizes that war, terrible as it is, implies a certain relation between nations to which the principles of law have a definite application. War as a terrible thing, but also as a condition of things with legal implications, was recognized early in our own national history. Perhaps no better statement of the legal and social effect of war has been made than that of Justice Johnson in the case of *The Rapid* (8 Cranch, 155) given in the Supreme Court of the United States in 1814:

In the state of war, nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent states exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat. War strips man of his social nature; it demands of him the suppression of those sympathies which claim man for a brother, and accustoms the ear of humanity to hear with indifference, perhaps exultation, "that thousands have been slain." These are not the gloomy reveries of the bookman. From the earliest time of which historians have written or poets imagined, the victor conquered but to slay, and slew but to triumph over the body of the vanquished. Even when philosophy had done all that philosophy could do, to soften the nature of man, war continued the gladiatorian combat: the vanquished bled, wherever caprice pronounced her fiat. To the benign influence of the Christian religion it remained to shed a few faint rays upon the gloom of war; a feeble light but barely sufficient to disclose its horrors. Hence, many

rules have been introduced into modern warfare, at which humanity must rejoice, but which owe their existence altogether to mutual concession; and constitute so many voluntary relinquishments of the rights of war. To understand what it is in itself, and what it is under modern practice, we have but too many opportunities of comparing the habits of the savage with those of civilized warfare.

This statement is an admission of the horrors of warfare, together with a realization that certain principles of law have been extended to it. There is, moreover, the point of view that the very existence of war produces a legal condition of things which must be taken into account by the parties to the conflict, by neutral states, and by individuals, whether citizens, nationals of neutral states, or enemy aliens. War, independently of its conduct and regulation, confers rights and imposes obligations of a legal character. These rights may be invaded, denied or impaired, and the obligations evaded at the risk of liability for serious legal consequences. The failure of a state or its inability to hold a country or individual accountable for such breaches does not lessen the obligation or the liability.

From a military point of view, "public war is a state of armed hostility between sovereign nations or governments." Grotius quoted Cicero to the effect that war is a contest or contention carried on by force. But "usage applies the term," he declared, "not only to an action (a contest), but to a state or condition: and thus we may say, war is the state of persons contending by force, as such." Bynkershoek also emphasized the concept of war as a state or condition of things rather than the mere idea of contest, while Vattel regarded it as a state of things in which a nation prosecutes its rights by force. Professor Stowell, in a recent publication, declares that "War is that condition in the relation between states or politically independent communities which results when one of these indicates its intention to make a presumably jural use of force without specific limitation against another, in order to overcome its resistance to the observance of international law." This definition, while generally adequate, suggests a distinction between "jural" and "non-jural" war, which distinction cannot yet be said to have been established in law. To get an adequate definition, I should like to quote from John Bassett Moore's *Digest of International Law*, the publication of which was contemporaneous with the founding of this Society:

Much confusion may be avoided by bearing in mind the fact that by the term war is meant not the mere employment of force, but the existence of the legal condition of things in which rights are or may be prosecuted by force. Thus, if two nations declare war one against the other, war exists, though no force whatever may as yet have been employed. On the other hand, force may be employed by one nation against another, as in the case of reprisals, and yet no state of war may arise. In such a case there may be said to be an act of war, but no state of war. The distinction is of the first importance, since, from the moment when a state of war supervenes third parties become subject to

the performance of the duties of neutrality as well as to all the inconveniences that result from the exercise of belligerent rights.

Accordingly, whether a war is right or wrong, just or unjust, "jural" or "non-jural," one of defense or of offense, or one which inflicts a wrong or repairs one, the legal consequences growing out of war as a *state* or a *condition* are generally the same. Nor does the regulation of the conduct of war in the field or on the seas affect the legal position of war. War in the military sense is clearly not war in the legal sense. And war, as regards its legal position, has not changed since 1906, the year our Society was founded, and the year Judge Moore's definition was published.

2. *The constitutional basis of war*

While war is international, in the sense in which we are discussing it to-night, and while international law principles are applied to it, nevertheless, it springs from constitutional authorization. All movements to regulate, to prevent, to renounce, and to outlaw war, come to grips sooner or later with the fact that a nation engages in war by means of the authority of its own municipal law, and by means of its unilateral decision and declaration. In the United States, all declarations of policy, exchanges of notes, treaties, and agreements, and even public opinion, must finally yield to the constitutional power of the Congress to declare war. Our constitutional arrangements made due allowance for the needs of the national defense, and for the declaration and conduct of war. The constitutional provisions having to do with the war-making power may be summarized as follows: the Congress has the power (1) to raise and support an army and navy; (2) to make rules and regulations for their government; (3) to provide for the organization, disciplining, and arming of the militia in all the states; (4) to utilize the militia to enforce the laws, suppress insurrections and repel invasions; (5) to declare war and to make rules for captures on land and sea; and (6) to make all laws necessary and proper to carry these powers into effect. Moreover, the President of the United States, while the head of our government machinery for maintaining peace, and while exercising general control of the foreign relations power, is also commander-in-chief of the army and navy. He may exercise the foreign relations power so as to bring on a war, or to make it inevitable. While we may record a growing public opinion in favor of continued peace, and an increasing tendency for officers of government to develop the processes of peace and to restrain the machinery and processes of war, there have been no changes in the war-making and war-conducting powers under the Constitution.

Declarations as to the policy of the United States with respect to the conquest of territory are effective only to the extent that the war-making power is exercised in keeping with the avowal of policy. Too often the policy is mistaken for the power. President Wilson declared on one occasion that the United States would never again seek another foot of foreign

territory by conquest. Such a declaration is laudable, and its application is probable. Yet, we have gained a good deal of territory by conquest, as well as through peaceful cession. It is not difficult to envisage a set of circumstances which would lead to territorial acquisitions such as followed the war with Mexico and the war with Spain. A treaty of arbitration, negotiated at the First Pan American Conference at Washington in 1890, recognized arbitration as "a principle of American international law," extended compulsory arbitration to certain classes of disputes, and provided also that title by conquest should have no further sanction under American public law. The treaty was rejected by some of the governments, and ratifications were not exchanged. This does not show that all treaties renouncing conquest will meet a similar fate. It does indicate the difficulty which such a declaration or agreement faces when so directly opposed to the war-making power, or to the rights of a victor in warfare.

The last 25 years has added little to the rules relating to the beginning of war, although many nations commenced hostilities within this period. The formal right to declare war is vested by the Constitution in the Congress. The legislative body, however, is not in a position to judge of the events which might justly occasion war. It seems within the discretion of the executive, therefore, to determine if and when war is desirable, and to make his recommendations to Congress accordingly. The effect is to vest the initiative of war-making in the President, while the legal power to declare remains with Congress. The first step in war-making, then, is a recommendation from the President. It is generally said that President Polk "made" the Mexican War. The House of Representatives on January 3, 1848, passed a resolution declaring that the Mexican War had been unnecessary and unconstitutional begun by the President. Seldom, however, has there been Congressional opposition to the presidential recommendation, except in the case of Congressmen who vote against it. The joint resolution for intervention in Cuba, passed by both Houses of the Congress, was in effect a declaration of war against Spain. Our neutral course during the World War, and our eventual entry into the conflict, disclose how slender a thread is the Congressional power to declare, and how powerful in practice is the President's function in recommending war. For several years President Wilson thought peace and neutrality to be the right and just course. In time, he declared that the right was more precious than peace, and the Congress sustained him in his recommendation that war be declared against Germany, if not in the sentiment expressed. Such is the dependence of the legal power to declare, in practice, upon the President's function to recommend.

Actual hostilities may cease through the surrender of a defeated party, an agreement, an armistice, or through the power of the commander-in-chief to suspend operations. But this does not conclude the war from a legal standpoint. The usual way is by means of a formal treaty of peace. The Constitution does not expressly confer upon any agency of the government

the right to make peace. The decisions of the Supreme Court hold that the President and the Senate may, through the treaty-making power, acquire territory by conquest or by cession. But under international law, title to territory gained through conquest is inchoate until formally ratified by a treaty of peace. The treaty of peace, then, seems to be the accepted legal and constitutional manner of ending a war. The general practice of the United States confirms this theory, but there has been no definite statement that the contrary would be impossible or unconstitutional. There is no doubt that a conquering state may, if it has the power and design, end a war by reason of its superior military force. The failure of the conquered state, through its constitutional channels, to ratify the provisions of an enforced peace would have little effect on the result. However, the legal consequences which follow a war must be regulated in some way, and the ordinary mode is by means of a treaty of peace. It has been asserted that a war can be legally terminated by a peace resolution passed by Congress and approved by the President. During the deadlock over the treaty of peace with Germany, certain leaders of the Senate, notably Senator Knox of Pennsylvania, urged this method of terminating the war with Germany. In May, 1920, both houses of Congress jointly resolved "that the joint resolution of Congress passed April 6, 1917, declaring a state of war to exist between the Imperial German Government and the Government and people of the United States, and making provisions to prosecute the same be, and the same is hereby, repealed, and said state of war is hereby declared at an end." President Wilson immediately vetoed the measure. It was passed again in July, 1921. President Harding gave his approval. A separate treaty was at length negotiated with Germany under which all rights belonging to the United States under the Treaty of Versailles were reserved to the United States. The legality of this procedure is both affirmed and denied. The argument in favor of it is that Congress, having declared war by resolution with the approval of the President, can end it in the same manner. The weakness of this argument seems to lie in the fact that, while the power to declare war is conferred upon Congress and is strictly a unilateral act, the making of peace is not so conferred and is an international, bilateral act. Even in the case of the vanquished state, it is certain that the agreement of the defeated government is not only essential but desirable in regard to certain provisions of the treaty. It is sometimes urged that the President may legally terminate a war by proclamation. He may agree to a termination of hostilities, but this grows out of his power as commander-in-chief, and is purely a power of municipal law. The formal ending of war, despite recent precedent, would seem to be an international transaction, requiring the assent of the parties, and can be celebrated only through a formal treaty of peace.

Experience during the last 25 years has not lessened the effect of war on the domestic legislation of a country, and upon fundamental rights of citi-

zens, which it generally curtails. Where martial law is established, the guarantees of individual liberty yield to the rules and regulations put into effect by the military commander. But the ordinary citizen does not escape the restriction of his rights, even where the civil authorities are functioning fully. The right of the state to demand the military service of those of military age, even against their will, has been more definitely established. Congress may exempt certain classes from the duty to serve, or it may provide for a different employment of those who object to military service on grounds of conscience. But the right to demand one's service is clear. The citizen, through the practice of the government, the laws passed by the Congress, and the decisions of the courts, must be more, rather than less, circumspect in exercising his freedom of religious worship, of the press, and of speech, and to assemble peaceably and to petition for a redress of grievances. Religious belief does not absolve anybody of his duties to aid in the defense of the state. The restraint of persons saying or printing anything which might hinder the operations or the success of the American forces in time of war is not regarded by the courts as an abridgment of freedom of speech or of the press. The right to petition does not extend to a request for the repeal of the espionage and the sedition laws, and against the military measures of the government in time of war. Such petitions have been held to violate the measures prescribed by Congress for the purpose of restraining the people at such times. It is not altogether a case of *inter arma silent leges*, but the movement is progressively toward that condition. International war means the contraction rather than the expansion, and in some extreme cases, the suspension rather than the exercise, of individual rights. As the Supreme Court has said, it is a question of degree, for the courts to determine, as to how far an individual may pursue his rights without endangering the safety of the state. The care taken by the citizen in exercising and pressing his rights must be greater, and the rights may be set aside more readily.

3. War prevention and the legal position of war

The past quarter-century has teemed with plans to divide wars into categories which condemn one kind of war, and justify another kind. Grotius divided wars into those which are justifiable, and those which cannot be justified. Such divisions today are wars of defense and of offense; wars to defend a right which has been invaded, and wars of aggression; wars in the interests of the people of the country, and wars only in the interests of a government. Professor Ellery C. Stowell, in his recent and able work on *International Law*, makes a distinction between "jural" and non-jural war. Jural war is "the full measure of force when used for a just cause and after the due observance of the steps of procedure regulating recourse to war." But "force used in the absence of these legitimizing conditions is aggression for the purpose of conquest and not jural war." Attempts to distinguish be-

tween different kinds of wars may have the good social effect of stigmatizing certain classes of conflict, and may serve to discourage states from embarking upon them hastily, or perhaps altogether. They may also tend to encourage and even to glorify certain kinds of war which are deemed legitimate. Legitimate or illegitimate war, in terms of present-day interpretation, is still war, a condition of things, a state, from which legal consequences will flow. The question of legitimacy does not affect the condition, or the legal considerations which attach to it. The plan to outlaw war, or to make certain kinds of war illegal, is assumed by some to change the legal position of war. Its legal position would be made to depend on the question of legitimacy, of justice, of right, rather than on the existence of a condition or a set of circumstances which may have come about through just or unjust means, but the existence of which must be recognized and the regulation of which must be attempted in the interests of civilized society. The legal position of war as a condition is a test relatively easy to apply, and is generally accepted. The question of legitimacy is open to many and variant interpretations, and to constant mutation. And as the world is organized today, it is more a question of policy than a question of law. Until the present-day distinctions are universally accepted and uniformly observed, it is unsafe, and indeed inaccurate to make war, from a legal standpoint, depend on what one nation or even a group of nations deems to be legitimate or illegitimate, just or unjust. This cannot be until, in the words of Locke, there is "a known law and a common judge." For if war is to be made illegal, the character of illegality must attach to the entire institution of war, and it must be prevented, not alone as a means of inflicting an injury, but as a means of redressing one.

International law has not, in the past, distinguished between wars of a legal and non-legal kind. The determination of guilt and of responsibility in war is something which has hardly as yet been brought within the sphere of judicial regulation. International law has encouraged the settlement of disputes by peaceful means, and has extended the classes of disputes which may be settled by the application of the principles of law. If war unfortunately came, little was gained from a legal viewpoint by the process of praising one side in the controversy as having fought a legal or jural war, and the other as having fought a non-legal or non-jural war. Both were parties to the same conflict, whatever the justice of the respective causes, and the legal position of each was fixed by the fact of engaging in war. The obligation of international law, in case of conflict, is to offer a set of rules or regulations which the belligerent states may observe in the conduct of hostilities, thus limiting the extent of war and reducing its horrors. I would not be understood as unfriendly to plans to reduce or to prevent wars in any practicable way. But I cannot see an advantage in yielding a workable, accepted concept of the legal position of war for one which must yet make its way, until the institution of war has disappeared.

It cannot be denied, however, that new attitudes toward war have developed within the period of our Society's life and that instruments and institutions have been established to give these attitudes practical effect. While these efforts have been, in the main, in the field of policy, attempts have been made to extend them into the field of law. Judge John Bassett Moore, in his presidential address before the American Political Science Association in 1914, set forth certain principles which are germane to our present inquiry. International law, he said, differed from municipal law, not in its essence or obligation, but in the method of its declaration and administration. This defect should be supplied by an organization which would give the administration of law a certain security. The organization would, first, set law above violence, (a) by providing suitable and efficacious means and agencies for the enforcement of law; and (b) *by making the use of force illegal, except (1) in support of a duly ascertained legal right, or (2) in self-defense.*¹ It would, in the second place, provide a more efficient means for the making and declaration of law. And finally, it would provide more fully for the investigation and determination of disputes by means of tribunals, possessing advisory or judicial powers, as the case may be. The processes of peace, recently established, have carried out, in part, these excellent principles. However, it should be observed that Judge Moore did not propose to make war illegal, but rather the *use of force*, except in two instances. It is perhaps well to examine some of the new attitudes toward war, and to discover, if possible, the effect of such attitudes on its legal position.

One attitude is disclosed in the Covenant of the League of Nations. One of the means by which the purposes of the League members are to be attained, *i.e.*, the promotion of international coöperation and the achievement of international peace and security, is "the acceptance of obligations not to resort to war." The heart of the Covenant, so far as the League attitude is concerned, is in Article 11:

Any war or threat of war, whether immediately affecting any of the members of the League or not, is hereby declared to be a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. . . . It is also declared to be the friendly right of each member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

Such an attitude is little short of revolutionary. Yet it is the greatest contribution of the League to the preservation of peace, and is far more effective than any scheme of outlawry. It does not distinguish between kinds of wars, but includes "any war or threat of war," and makes it the business of

¹ Italics are the author's.

the whole League, which is substantially making it the concern of civilized society. Articles 12, 13, and 15 set forth the conditions of recourse to judicial or Council settlement. Under Article 12, the League members agree to submit any dispute likely to lead to a rupture to one of several forms of peaceful settlement, and agree not to resort to arms until three months after the arbitrators, the court of justice, or the Council, as the case may be, have spoken. Under Article 14, the parties agree to refer to arbitration or judicial settlement all suitable cases which cannot be settled by diplomacy, and set forth the details for submission. Article 15 provides for reference to the Council of disputes not referred to arbitration or judicial settlement, and arranges the procedure for such reference. Article 16 gives "teeth" to Article 11, and provides for action in case the succeeding articles are ignored. It reads:

Should any member of the League resort to war in disregard of the covenants under Articles 12, 13, or 15, it shall *ipso facto* be deemed to have committed an act of war against all other members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking state, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking state and the nationals of any other state, whether a member of the League or not.

The League attitude, then, is disclosed in Article 11, which makes war or a threat of war the concern of the whole League; and Article 16, which makes a resort to war in violation of its obligations not to do so, an act of war against all other members of the League, as well as the member attacked. War is not outlawed in express terms by these provisions. Indeed, war may be resorted to after three months following the award of arbitrators, the judicial decision, or the report of the Council. And disregard of certain articles is made *ipso facto* an act of war against all League members, which may be resisted by forcible measures short of war, and also by acts of war. In effect, the League induces peaceful settlement, and makes refusal to refer to peaceful settlement, under certain conditions, a ground for war. Thus the members of the League, while seeking to reduce war of all kinds as much as possible, also anticipated its possible use as a means to protect the League's covenants.

Another attitude toward war is found in the Treaty of Mutual Assistance. Nothing said about it is so eloquent as its first article:

The High Contracting Parties solemnly declare that aggressive war is an international crime, and severally undertake that no one of them will be guilty of its commission.

The treaty, it was said, would "extend" the Covenant, and would "facilitate" the application of certain provisions of the Covenant, notably, Articles 10 and 16. But it contains original and even striking features of

its own. These features are: (1) distinctions in war are definitely set forth; (2) one sort of war is made an international crime; and (3) it makes aggression the test of criminality. The terms of the treaty supported these principles. General assistance was assured in its execution, to be buttressed by supplementary defensive arrangements. In case of a threat of war, the Council could act to set in motion the sanctions of Article 16 of the Covenant, which were authorized only in case war had actually broken out. Should one or more of the contracting parties engage in war, the Council, within four days after notification by the Secretary General, could determine which were the victims of aggression, and whether they were entitled to the general assistance set forth in the treaty. What constitutes an aggressive act was not settled by the treaty. It was suggested, in a memorandum to the governments, that no technical test of an act of aggression existed, but a certain procedure might determine what was an aggressor state. If the Council should fix a neutral zone, and forbid the parties to cross it, doing so might be regarded as an act of aggression. Or should an armistice be declared, and the parties invited to submit their dispute to the Council or the Permanent Court of International Justice, a refusal so to do might be regarded as an act of the aggressor. The establishment of demilitarized zones was encouraged. It was also provided that the cost of military operations and of reparations for all material damage, in case of war, should be borne by the aggressor state to the farthest reach of its financial capacity. The treaty also contained definite obligations regarding disarmament. The treaty proved to be unacceptable, and to be too revolutionary in its provisions for the prevention of war. The British Government regarded it as too complicated, and too difficult to apply. The nature of the general guarantee was feared by some states, and the failure to define aggression was criticized. It was also objected that it was not possible to determine the aggressor in every international conflict. Had the treaty become effective, our notions as to the legal position of war would have to be radically revised.

The next attempt to distinguish between kinds of wars is found in the Protocol for the Pacific Settlement of International Disputes, of 1924, and commonly known as the Geneva Protocol. It insisted on the relationship of the trilogy of preventatives—arbitration, security, and disarmament. It dealt with the obligations under Article 16 of the Covenant of the League, with threats of war, with the question of aggression, and with the principle of mutual assistance. Its leading features were: (1) War was outlawed through its denunciation as an international crime when aggressive in character. (2) The principle of compulsory arbitration, buttressed by sanctions, was introduced. Certain cases were to be subject to the compulsory jurisdiction of the Permanent Court of International Justice without special agreement. Compulsory arbitration through agreement between the parties or a request of one of them, a unanimous decision by the Council, or compulsory arbitration by Council mandate, were the forms the settlement might take. Thus,

the parties must submit, either to the Permanent Court of International Justice, to the decision of the Council, or to the award of arbitrators. And one party might request and obtain the compulsory settlement. (3) The definition of aggression and the determination of an aggressor was dealt with. After much discussion, it was agreed that a presumption of aggression should hold good until proof to the contrary was produced in a decision of the Council. Such a presumption was deemed sufficient to use sanctions when resort to war was accompanied by (a) refusing to submit to peaceful settlement or to accept a decision resulting from it; (b) by the violation of measures of a provisional nature authorized by the Council; and (c) by ignoring a decision which recognized that the dispute grew out of a matter within the domestic jurisdiction of the other party, without having first submitted the question to the Council or the Assembly. Beyond these tests, decision of the aggressor must rest with the Council. (4) The protocol provided additional arrangements for security and sanctions. The parties, in case of dispute, were not to use force or to prepare to use it. If an offense should be committed against the provisions of the protocol, the Council could by two-thirds majority demand that the guilty state end it; and if met with refusal, could decide this to be a violation of the Covenant and of the protocol. Under the Covenant (Article 16) Council action must be unanimous. Under the protocol, the Council could name the aggressor, and call upon the state to apply the sanctions set forth in the Covenant. The protocol also provided (5) for mutual economic and financial assistance between the state attacked and the aggressor state, as against an aggressor state; (6) for special treaties providing for the application of sanctions and for additional guarantees of assistance; and (7) for the reduction of armaments. The life of the protocol was dependent upon the adoption of a treaty of disarmament. The protocol, like the Treaty of Mutual Assistance, failed, due in the main to the opposition of Great Britain. Sir Austen Chamberlain objected to the additional classes of disputes which the League would have to decide, on the ground that they could induce new means of defiance of the League's decisions; to the non-membership of the United States, which made the attachment of additional liabilities to the League unwise until the effects of non-membership were disclosed; and to the assumption that "gaps" in the Covenant must be filled by general arrangements. Rather it should be met "by making special arrangements in order to meet special needs." Thus ended the hope of a general treaty on the points covered by the protocol.

The Locarno treaties were the logical successors of the Geneva Protocol. They were independent of the League, but depend in large measure on it. The main treaty was one of security, especially as between France and Germany, with Italy, Great Britain and Belgium signing as guarantors. The intervention of the Council was provided for under certain conditions. There were also treaties to make effective certain terms of the Covenant, and

four arbitration conventions between Germany, and Belgium, France, Poland, and Czechoslovakia, which provide for the peaceful settlement of disputes between the parties. These regional agreements do not make the contribution to the general nature of war as does the League Covenant, or the theoretical contributions of the rejected Treaty of Mutual Assistance and the Geneva Protocol, but they do contain the principles of the more general treaties, such as arbitration, conciliation, guarantees, and non-aggression. Moreover, they provided for the intervention of the Council, and for recourse to the Permanent Court of International Justice.

A final definition of attitude toward war may be found in the Pact for the Renunciation of War. The preamble recognizes the duty of the signatory powers to "promote the welfare of mankind"; regards the time as at hand for the renunciation of war as an instrument of national policy; expresses the conviction that changes in foreign relations shall be peaceful and that signatory Powers advancing their interests through war should not enjoy the benefits of the treaty; and invites the adhesion of other nations to the treaty. By Article I, the parties to the treaty condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy. By Article II, the Powers party to the treaty agree that only peaceful means shall be sought as a settlement or solution of all disputes or conflicts, whatever their nature or origin. Such are the proposals contained in this remarkable document of two brief articles and 78 words.

The Government of France raised six points in connection with the treaty concerning which it entertained doubts. These points were answered by Mr. Kellogg, then Secretary of State, by advancing the following propositions: (1) nothing in the treaty interferes with the right of self-defense, which is inherent in the sovereignty of each state and implicit in every treaty; (2) there is no inconsistency between the authorization of war by the League Covenant and by the anti-war treaty; (3) positive obligations to go to war under the Locarno treaties are not inconsistent with the terms of the Pact of Paris; (4) treaties which guarantee neutrality are not in contravention of the Kellogg-Briand Pact; (5) if one party to the treaty resorts to war in violation of its terms, the other parties are released automatically from their obligations to the treaty-breaking state; and (6) the world-wide application of the treaty is not sacrificed by the negotiation and signature, at first, of the leading Powers. Great Britain reserved the application of the treaty to certain regions where her interests were so vital that her freedom of action could not be prejudiced by a new treaty. A distinguished member of our Society argued, and with a good deal of logic and justification, that the terms of the treaty were so ambiguous that it deserved rejection. It was asserted that certain forms of conflict were expressly sanctioned by exceptions set forth in the British and French reservations, and included wars of self-defense, with the individual nation as the sole judge of the meaning of the term and of the circumstances requiring its application; and also wars under

the League Covenant, the Locarno pacts, and the French treaties of alliance; and wars in the regions of Great Britain's special and vital interests. Thus, instead of renouncing or outlawing war, the treaty sanctions certain forms of conflict accepted as facts, but not recognized as legal in the sense of being just.

Certain things are to be remembered about the pact. For one thing, it is a renunciation, rather than an outlawry of war. Again, war is renounced as an instrument of national policy rather than as a legal process. The exceptions in the reservations are the usual ones which a state will normally make in any agreement not to resort to war, or else they grow out of instruments for the maintenance of peace. The pact is a simple renunciation of war as a policy of a national government, and an agreement to seek only pacific means for the settlement of international differences. It is designed to be a simple, and not a technical instrument, and to attack war in the field of politics rather than in the field of law. It has had little or no effect on the legal position of war.

The effect of the general agreements for the prevention of war on the legal position of war may be briefly stated. The Pact of Mutual Guarantees and the Geneva Protocol introduced distinctions, guarantees and sanctions which, if adopted, would have altered substantially the legal position of war. The League Covenant makes any war or threat of war the business of the entire League, and therefore of the most of civilized society, and makes the disregard of the League's covenants not to resort to war an act of war against all members of the League. The Pact of Paris renounces, in the most general terms, war as an instrument of national policy, and seeks only pacific means for the solution of disputes. Exceptions, such as wars of self-defense, are subject to the decision of each state. Both the Covenant and the Pact of Paris set forth substantial, but different, alterations in the attitudes of states toward war. One makes it the business of the whole world. The other, while making the renunciation general, leaves the ways and means of renunciation to each state. Neither the Covenant nor the Paris Pact outlaw war, nor do they try to make iron-clad divisions into wars which are legal and illegal. Yet both recognize certain forms of conflict which may be necessary and even just, and other forms which may have to be met with resistance. War remains, then, "the existence of a legal condition of things in which rights are or may be prosecuted by force." We cannot yet posit the legal position of war on a basis of distinctions, *i.e.*, wars which are just, and therefore legal, and wars which are unjust, and therefore illegal. It is a distinction as difficult to draw, and with as unsatisfactory results, as to determine what constitutes an act of aggression, and who is the aggressor.

4. Regulation of the conduct of war

No discussion of the legal position of war can overlook the laws or regulations for the conduct of war. The year following the founding of the So-

ciety (1907) resulted in a number of conventions negotiated at the Second Hague Conference, for the regulation of warfare. These conventions related to the opening of hostilities, the laws and customs of war on land, the rights and duties of neutral Powers and persons in case of war on land, the status of enemy merchant ships at the outbreak of hostilities, the conversion of merchant ships into warships, the laying of automatic submarine contact mines, the bombardment by naval forces in time of war, the adaptation to maritime warfare of the principles of the Geneva Convention, certain restrictions with regard to the exercise of the right of capture in naval war, the creation of an international prize court, and the rights and duties of neutral Powers in naval war. In 1909, the Declaration of London, negotiated by the representatives of the principal maritime Powers at the London Naval Conference, sought to codify the laws of maritime warfare, especially as they touch the rights, interests, and obligations of neutrals. The conventions of the Second Hague Conference were signed, for the most part, on behalf of about forty states, the number varying, but not appreciably, as regards each instrument. Ratifications were made by about 25 states. Professor Manley O. Hudson, in the January, 1931, issue of the *AMERICAN JOURNAL OF INTERNATIONAL LAW*, has concluded: (1) that there has been no activity as regards these conventions by the signatories since 1914; (2) that the new states have given them little attention; and (3) that there has been little interest since 1914 in extending the conventions which relate to the conduct of war. The Declaration of London was not ratified by the principal Powers which aided in drafting it, and some of the leading belligerent Powers expressly refused to be governed by its provisions in their relations with neutrals.

The extent to which the laws of war, or the so-called laws of war, were violated in the World War is too large a subject for our determination here. Professor Garner, in his *International Law and the World War*, has thrown much light on this subject. That the conduct of warfare ignored many of the rules for its regulation is all too true. That the regulations were never observed, that they were entirely swept aside, and that they were of no value in a war unsuited to the forms of conflict for which they were intended, is hardly true. That the war would have been all the more terrible without the restraining influence of the laws and customs of war on land and sea, is clear. Moreover, the Leipzig trials resulted in the punishment, by German tribunals, of commanders who were charged with serious violations of the laws of war. It is possible that too much attention was given to the regulations for the conduct of war, and not enough to the prevention of war; that too much reliance was placed on them; and that they should not have been dignified by the term "law." Yet, that they have not always proved efficacious is no great and permanent argument against them. Treaties of neutralization, and agreements not to resort to war, do not always prove efficacious. In an age which is preoccupied with peace, it is natural that

little attention should be given to conventions relating to the conduct of war. But the conventions of 1907, especially, contain principles which have proved and will prove of value in case of war.

The important question is whether the laws or rules for the conduct of warfare can in the future serve any useful purpose. Many people assume that war will or should be no more, and that therefore all effort should be given over to measures of outlawry or prevention. It is also assumed that war is so bad that nothing can be done about it except work against its recurrence. Many seem to feel that a redefinition of the laws of war is useless, on the ground that they will be ignored in the future as they were in the last conflagration. I cannot subscribe to this view. It is the part of wisdom and statesmanship that we shall work for prevention, but, knowing the weakness of mankind to depart in time of stress from a noble ideal, that we shall join also in measures which will mitigate its horrors, should it come.

Tolstoi declared that war is barbarism; that mitigations of it will tend to make it a "pink tea" affair; and that, if it should come, it should be made so terrible that mankind will tire of it. But this is hardly the proper attitude for the jurist. It is easy to take the view that the only thing worth while is the prevention of war, and not its regulation. Those who believe in war and profit from it, seek nothing more than to spread the idea that future wars will include all mankind, combatants and noncombatants, that wealth and man-power will all be conscripted, and that all men, materials, and money will be joined in the death grip. Hence, they declare, all efforts to reduce war to its past dimensions and limits are wasted and useless. If war unhappily comes, even though it be barbarism, it is the business of the jurist to help make its control and regulation as great as possible, and to restrict its activity in the interests of humanity, economics, innocent and neutral parties, and in the interest of the recovery, even of the defeated state, as rapidly as possible to its place in international society. The professional militarist with the war mind will welcome the scrapping of the restraints which have developed and which have substantially modified the former practices of warfare. Conditions as regards the conduct of war are bad, but they will not be helped by a surrender on the part of the jurist and the international lawyer to the war mind, which contends that future wars must involve all the people and all the resources of the enemy states.

The disregard of basic rules of warfare by some of the belligerents in the last war, such as the non-observance of the distinction between combatants and noncombatants, raises in the minds of some, a question as to their validity. Drafting armies, the employment of men in munitions factories, and the general integration of all the man-power and the resources into the war scheme and the war organization lend a certain color to this theory. Along with it is the view, with the abolition of the distinction

between combatant and noncombatant, that all persons of the enemy state, including women and children, are the legitimate prey of the enemy and subject to hostile attack. The use of scientific instruments in warfare has increased its horrors. But even these measures may be put under control. The Washington Conference attempted to fix the status of the submarine as a war instrument, and it outlawed the use of poisonous gases, because, first, of its effect on noncombatants, and second, because of its inhumanity as an instrument of regular warfare. Emphasis on humane conditions of warfare will be insisted on only by the friends of peace and of civilization. War should not have unlimited sway, nor should we by an attitude of mind increase its power and destructiveness. In following the illusion of an immediately warless world, we shall find ourselves engulfed in some sanguinary conflict, unlimited as to scope, persons, and measures, which may destroy civilization. A return to some first principles, and a redefinition of the laws of war along the lines of former endeavor, will be opposed by many. But it is terrible that the end is lost in the mere pursuit of the conflict.

II. THE LEGAL POSITION OF NEUTRALITY

1. *The neutral concept*

Neutrality is defined "as the legal status arising from the abstention of a state from all participation in war between other states, the maintenance by it of an attitude of impartiality in its dealings with the belligerent states, and the recognition by the latter of this abstention and impartiality. From this legal status arise the rights and duties of neutral and belligerent states, respectively." Accordingly, neutrality is not mere inaction, abstention, nor the mere refraining from doing something. It is not a "do-nothing" policy or status, which ignores a conflict, or takes as little account of it as possible. Neutrality is an active status, under which the neutral state seeks, by positive and definite measures, to discharge its obligations, and to preserve and maintain its rights. Being a legal status, it must have behind it the power to direct and to restrain the conduct of private individuals within the borders of the neutral state, and it must be able to defend its position as a neutral against belligerent states. Only the neutral state will insist upon an observance of its neutral rights. Belligerent states will not do so. The belligerent will violate the rights of the neutral, will demand a scrupulous regard for neutral duty as regards itself, will wink at and even encourage unneutral conduct disadvantageous to an enemy, and will hope and work for the day when the neutral state will join it in the conflict. "Waging neutrality," while perhaps too strong a term to use with accuracy, does convey in part the active, difficult, and frequently lonely rôle of the neutral. When speaking of neutrality, therefore, we are speaking of a legal position, of rights and duties which have a foundation in law. Naturally, the belligerent state which stands to gain by an end of neutrality will, especially during the period of war, do everything it can to put obstacles in

the way. The question is whether it is of advantage to the neutral state or the community of neutral states to remain so.

During the Napoleonic and the French Revolutionary Wars, the Government of the United States was faced with practically the same problems as during the World War. The difference is that in the first case we regarded neutrality so worth while that we were willing to put up with many inconveniences, and to make a stubborn resistance to interferences with our neutral privileges. The Jay Treaty definitely fixed our position as neutral in the controversy. While we carried on a limited conflict with France, and also formally declared war with England over related questions, we did not, after the proclamation of neutrality, consider the abandonment of our neutral position and joining one of the parties in the conflict. During the World War, we maintained the view that neutrality was worth while for a few years, and then abandoned it for the status of belligerent. These two opposite experiences are not so instructive as might be supposed in determining the future of neutrality, especially as regards the United States. In one case we thought it sufficiently worth while to maintain over a score of years of European war. In the second case we came, in time, to a different conclusion, and acted on that conclusion.

We are forced to recognize, however, the fact that many are waging war against the very concept of neutrality. To get rid of the condition or status, the notion must submit to attack, and if possible, disappear. Moreover, if neutrality can be divested of its legality, or if its legal position can be destroyed, the relegation of the concept to the scrap-heap would be greatly facilitated. The arguments directed against it are legion. A speaker at the last annual meeting of the Society viewed neutrality in the future to be both impossible and immoral, and said that it could not be impartial. If it is no longer possible, then the attributes of morality and impartiality need not concern us, as it would be purely an academic discussion. Neutrality, however, has been as possible, as moral, and as impartial as belligerent states have allowed it to be. It is also urged that the belligerent status is the easier and the more convenient status than the neutral status, and that the burdens of neutrality are necessarily more vexatious and irksome than are the obligations of war. And others declare that under recent agreements for peace, such as the Covenant of the League and the Pact of Paris, neutrality cannot exist; or if persisted in, becomes virtually an international crime; or else that the obligation to remain neutral, in the sense of being impartial, no longer holds. Some argue that it is as impossible to be neutral in thought as it is for a nation to be officially neutral.

President Wilson, at the beginning of the war, placed neutrality not alone on an official, but also on a personal, moral, intellectual basis. He declared:

Every man who loves America will act and speak in the true spirit of neutrality and friendliness to all concerned. . . . The United

States must be neutral in fact as well as in name during these days that are to try men's souls. We must be impartial in thought as well as in action, must put a curb . . . on every transaction which might be construed as a preference of one party to the struggle before another. . . . Shall we not resolve to put upon ourselves the restraints which will bring to our people the happiness and the great and lasting influence for peace we covet for them?

The President, in urging personal as well as official neutrality on the part of the people of the United States, may have gone too far. Presidents cannot control the thoughts of the people. To the President, a certain distinction of morality and justice would characterize us if we were "impartial in thought as well as in action." To urge official neutrality, however, was within his clear right, and indeed, was his official duty. As unneutral thought induces unneutral conduct, the President perhaps desired merely to make our thinking correspond with our duty.

When war was declared, Mr. Wilson justified our action on high moral grounds, just as he had urged and justified our neutral position. For sometimes the greater morality may be on the side of remaining neutral when there is not a legitimate cause for war, than entering a conflict when the cause is declared by the interested parties to be just. Both are relative, not absolute questions. In the first case, no cause for war had arisen. In the second case, it had. And he justified our abandonment of neutrality in the following words:

Neutrality is no longer feasible or desirable where the peace of the world is involved and the freedom of its peoples, and the menace to that peace and freedom lies in the existence of autocratic governments backed by organized force which is controlled wholly by their will, not by the will of their people. We have seen the last of neutrality in such circumstances.

Such was the justification. He did not then envisage a complete end of neutrality—one who had labored for its rights and privileges, and for the distinction of remaining at peace with the world, could hardly have done so. It was ended "in such circumstances," which he had described in his message to Congress, and these circumstances were far different from those which had inspired the proclamation of neutrality.

The greatest opponent of our neutrality policy seems to have been Walter Hines Page, American Ambassador to England. His experiences in this regard are set forth in his *Life and Letters*, under the caption, "Waging Neutrality." To Page, clearly enough, our neutral condition seemed almost a nightmare. He declared in a letter to his brother that neutrality was a quality of government—only an artificial unit. No man, he said, could be neutral. The President and the Government of the United States had, in insisting on the moral side of neutrality, missed "the larger meaning of the war," which to Page was merely a movement of the Kaiser to extend his

personal sway. Moreover, the President had been mistaken in assigning essentially economic causes to the war. Mr. Lansing, who argued consistently for our neutral rights, was described in Page's *Life and Letters* as tactless in his methods, crude and irritating in his literary style, and discourteous in his statements. He was neither pro-British nor pro-German, but merely a lawyer, and American rights at sea meant to him a "case," with himself retained as counsel. If this analogy be true, Mr. Lansing at least discharged his duties as counsel with efficiency and skill, and with a certain loyalty to country, cause, and to his superior officer. Mr. Page seemed to advocate a complete surrender of neutral rights, especially to Great Britain. In a letter to President Wilson he declared that we were getting into deep water needlessly over the shipping question. He asked that we "acquiesce" in the British Orders in Council, and that such rights as we had be "reserved." His opinion of the struggle is disclosed in the following excerpt from his letter to the President:

The present controversy seems here, where we are close to the struggle, academic. It seems to us a petty matter when it is compared with the grave danger we incur of shutting ourselves off from a position to be of some service to civilization and to the peace of mankind. In Washington you seem to be indulging in a more or less theoretical discussion. As we see the issue here, it is a matter of life or death for English-speaking civilization. It is not a happy time to raise controversies that can be avoided or postponed. We gain nothing, we lose every chance for useful coöperation for peace. In jeopardy also are our friendly relations with Great Britain in the sorest need and in the greatest crisis in her history.

As a representative of the Department of State remarked, Mr. Page was *persona grata* in London, "since he wholly agrees with the British point of view." This phase of our diplomacy requires some attention, for the reason that so many writers, following the opinion of Mr. Page, have regarded our conduct relating to our neutral rights as dishonorable. But many people who have long followed our neutrality policy find it difficult to understand this view, and impossible to share it. It was hardly dishonorable to insist upon a due respect for our simple neutral rights, or to prevent violations of our neutral position. Much of the good in American diplomacy has come from our advocacy of neutral rights, and from our regard for the rights of small states. That our interests ultimately dictated the abandonment of the neutral position and our entrance into the war on the side of the Allies, does not lessen the righteousness, during the days of our neutrality, of the effort.

To "reserve" our rights as neutrals would merely have meant their abandonment. Moreover, all belligerents, not England alone, would be entitled to like reservations. The cases of the *Lusitania* and the *Sussex*, and the submarine controversy with Germany could hardly be "reserved," and to reserve for one and not for the other would have been a contradictory

position. It was an old trick for belligerent governments to hold neutrals responsible for the unneutral conduct of the other belligerent.

The traditional position of England on the question of the freedom of the seas would seem to explain her attitude on the question of neutrality and neutral rights, particularly when she is at war. And even when neutral, she has taken positions which are incompatible with the general principles of neutral duty. When the United States, after the Civil War, asked for the arbitration of the Alabama Claims, on the grounds of unneutral conduct, Lord Russell replied: "Her Majesty's Government are the sole guardians of their own honor. They cannot admit that they may have acted with bad faith in maintaining the neutrality which they profess. . . . They must therefore decline either to make reparation and compensation for the captures made by the *Alabama* or to refer the question to any foreign state." Mr. Adams punctured this argument in a celebrated reply. It was equivalent to declaring, he said, "that a neutral power is the sole judge of the degree to which it has done its duty under a code of its own making," that the neutral state was the only judge of its own actions, and that international law did not protect the rights of neutrals. Such a position would make neutral ports, in future wars, the centers for organizing movements against belligerent commerce, with consequences not in the least favorable to a country like Great Britain. While this extreme position was abandoned, and the case was submitted to arbitration, it does disclose a certain attitude toward neutral duty.

Furthermore, the British attitude toward neutral rights, especially when she is at war, is clearly not directed toward their maintenance and preservation. In nothing is this so clear as in her position on the alleged right of belligerents to enforce retaliatory measures against neutrals, on the ground that the enemy can be met only in this way, and that retaliation is accordingly a belligerent right. An Order of Council of February 17, 1917, set forth that a vessel found on the high seas on her way to or from a neutral port providing access to enemy territory, without calling at a British or Allied port, would be regarded as carrying goods of enemy origin or to an enemy destination, and therefore liable to capture and condemnation. The order was designed to meet the German announcement of unrestricted submarine warfare in certain indicated zones. In the case of the *Leonora*,² a Dutch vessel, carrying coal from Rotterdam to Stockholm, which was produced in Belgium by German collieries and sold to a Swedish company, it was held that the order, under which it was captured, and together with the cargo, condemned, did not under the circumstances seriously and unreasonably interfere with the rights of neutrals. The position of Lord Sumner in this case is perhaps typical of the British attitude:

There are certain rights, which a belligerent enjoys by the law of nations in virtue of belligerency, which may be enforced even against

²3 B. & C. P. C. 181, 385 (1919) A. C. 974.

neutral subjects and to the prejudice of their perfect freedom of action, and this because without those rights maritime war would be made of none effect.

Such a doctrine places the neutral at the mercy of the belligerent, makes it suffer from a conflict in which it has no part and no interest, and causes the state which has remained at peace to yield clear points of right to the state which has had the folly or the bad fortune to enter into war. The United States will doubtless, in future conflicts where it is neutral, refuse to allow such an interpretation to prevail, and will be able effectively to challenge it. Only superior naval power and a condition of war make such an interpretation possible.

Only an end of neutrality can mean the disappearance of the concept of neutrality. An universal membership in an organization such as the League of Nations, with a scrupulous regard for its covenants, could bring it to an end. As long as there are large maritime states outside the League, and large ones inside the League with a lukewarm attitude toward coöperation in war, neutrality will continue. Whether a state continues neutral or becomes a belligerent is one of circumstances, depending on its interests. The "circumstances" dictated the abandonment of our neutral position in 1917, as they dictated England's desperate attitude toward neutral rights. Nothing short of universality can prevent it. Until then, neutrality will be possible. It may also be substantially, though not, perhaps, absolutely impartial. Nor can I see how abstention from a conflict which a state does not wish to enter, in the absence of an agreement to the contrary, is an immoral act. It may be inconvenient and burdensome. But the right to remain at peace with the nations of the world is worthy of any reasonable effort to maintain it.

2. Neutrality and municipal law

Neutrality depends in large part on the municipal statutes of a country, especially as regards the neutral conduct of its citizens and residents. A proclamation of neutrality, while generally the pronouncement of the executive, is a unilateral act of a national state, and sets forth the policy of a country as determined by its domestic civil authority. Where one or both of the parties are not independent states, such a proclamation serves as a recognition of a belligerent status, with the right to employ belligerent rights. Moreover, neutral states in all wars, and maritime states especially, find it necessary to define their relation to the conflict. It is difficult to see how this definition could take place, if a state may be, as some have suggested, less neutral toward some states, and more neutral toward others. The first neutrality proclamation of the United States, issued by President George Washington on April 22, 1793, is worth quoting at this point:

Whereas it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands, of the one part, and France on the other; and the duty and interest on the

United States require, that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent Powers:

I have therefore thought it fit by these presents to declare the disposition of the United States to observe the conduct aforesaid towards those powers respectively; and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever, which may in any manner contravene such disposition.

And I do hereby also make known that whatsoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against any of the said Powers, or by carrying to any of them those articles which are deemed contraband by the *modern* usage of nations, will not receive the protection of the United States, against such punishment or forfeiture; and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons who shall, with the cognizance of the courts of the United States, violate the law of nations, with respect to the Powers at war, or any of them.

The United States has given effect to its conception of neutral duty in the form of positive laws, which are often termed the "neutrality laws of the United States." The first law, passed on June 5, 1794, forbade (1) the commissioning of American citizens to serve a foreign prince or state; (2) the enlistment or hiring to enlist in the service of another state; (3) the fitting out and arming of vessels to be used in a hostile manner against countries with which the United States was at peace; (4) the commissioning of such a vessel or the augmentation of its forces; and (5) the setting on foot of military expeditions against foreign states within the territory or jurisdiction of the United States. The President was authorized to use such military forces as were necessary to enforce the law, and the federal courts were given jurisdiction over captures within American territorial waters. On March 3, 1817, a new law was passed forbidding unneutral conduct against any "foreign prince, state, colony, district, or people." The general neutrality law of 1818 embraced and supplanted all previous ones.

The celebrated rules contained in Article VI of the Treaty of Washington with Great Britain, May 8, 1871, have been regarded as a landmark in the recognition of neutral duty. The governments concerned agreed on the following rules of "due diligence" as binding neutrals:

First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or to carry on war, as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other,

or for the purpose of renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly. To exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

Various proclamations of neutrality have been issued, in order to define our relation to conflicts, and to restrain our people within the limits of neutrality. The rules of "due diligence" of the Geneva Arbitration were introduced into Article VIII of the Hague Convention of 1907 concerning the Rights and Duties of Neutral Powers in Naval War. The phrase "due diligence" was eliminated, and each nation agreed to "employ the means at its disposal" to prevent violations. Thus the municipal and treaty arrangements of the United States became in effect internationally binding. New laws were required during the World War, due to new conditions and situations. Under a law of 1915 the government was authorized through the collectors of customs to withhold clearance from any vessel which might reasonably be believed to intend to carry fuel, arms, ammunition, men, or supplies to a belligerent, in violation of our neutral duty. Just before the end of Wilson's first administration, he asked Congress for permission to arm American merchantmen for defensive purposes. The measure was defeated, due to a filibuster in the Senate led by Senator La Follette. The President issued a statement to the effect that "a little group of wilful men, representing no opinions but their own," threatened the safety of the country. He advocated the adoption of a cloture rule in order to prevent dilatory tactics on the part of all minorities. The Senate amended its rules so as to limit, upon a two-thirds vote, each Senator to one hour in discussing any one measure before it might come to a vote. An Act of Congress of June 15, 1917, forbade sending from American waters any ship armed or converted in American waters, under any contract or with any intent that it should be delivered to a belligerent nation.

The neutrality laws of the United States, which operate in time of peace, in certain instances, as well as in time of war, are binding on the people and the country until they are changed or repealed. The obligation of the citizen to obey them is clear; the duty of the government to enforce them is clearer still. The permanent ending of neutrality is therefore not such a simple thing. For the interest and the fortune of the citizen is bound up with the fortunes of his government. The obligation of the citizen, in both war and peace, until the obligation is removed by the competent authority, is well stated by the Supreme Court of the United States:

The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the Government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared

war, and equally bound to commit no act of hostility against a nation with which the Government is in amity and friendship.

This principle is universally acknowledged by the laws of nations. It lies at the foundation of all governments, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to citizens of the United States. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the Government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territory of a country with which our Government is pledged by treaty to be at peace, without a breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation.³

3. *The position of American neutrality and neutral rights during the World War*

When the World War broke out in August, 1914, the United States at once fixed its relation to the belligerents through a proclamation of neutrality. The days of the war, before our entry on the side of the Allied Powers in April, 1917, were marked with difficulties, both in preventing violations of our neutrality and in securing proper respect for our neutral rights. The rights and duties of neutrals were involved. Great Britain, early in the conflict, declared the North Sea to be a military area, notified neutrals of a directed routing, and gave warning against the planting of mines by the German Government. The United States attempted to get the Powers to agree to the rules of the Declaration of London of 1909 as regulating neutral rights and commerce during the war. Germany and Austria accepted, but Great Britain insisted on substantial modifications. Later the United States rested its claims on the existing rules of international law, and on treaties with the belligerent Powers.

Since the German fleet was not in action, the leading violations of American neutral rights were committed by Great Britain. British and French censorship over messages sent by wireless or cable led to a brief controversy. This was entirely under the control of the belligerent governments. The inviolability of the mail-pouches of the diplomatic missions of the United States was recognized by all of the Powers, under conditions expressly declared. The Allied Governments also insisted upon the seizure of mails bound for neutral countries. Here again Great Britain was the arch-offender. Parcel post was refused the category of letters, correspond-

³ Kennett v. Chambers, 14 How. 38, 49; Moore, International Law Digest, Vol. VII, pp. 873-874.

ence, or dispatches. Even ordinary correspondence and general mail became subject to search and seizure, due to the alleged practice of covering enemy plans with the shield of neutral correspondence. Such intercourse formed a part of the usual transactions of the enemy, which the Allied Governments insisted they had the right to resist and prevent. The settlement of the question was completely in the hands of the belligerent Powers. Several unneutral acts were committed by vessels of the British fleet, such as communicating with the American shore for supplies, and illegally taking on coal within the territorial waters of the United States. American ships were detained, and persons suspected of intending to serve in the enemy forces were removed therefrom, under the theory that our ships were guilty of an unneutral service. Some of these removals were regular, but some were irregular, and in the latter case the seized persons were released.

An annoying question was that of armed merchant ships. At the outbreak of the war, Great Britain notified the United States that she would be held responsible for injuries resulting to British interests from vessels converted to warships or armed in American ports, even though the completion of the act of conversion took place on the high seas. British merchant vessels, it was asserted, were armed for self-defense only. The position of the United States was that a merchant vessel belonging to a belligerent should not arm itself so as to avoid capture by lawful and legitimate processes. The United States was led to define its attitude toward armed belligerent vessels entering its ports, and toward an armed ship on the high seas. The presence of armament would not of itself justify attack. Ultimately we armed our own merchantmen. Congress, after an emphatic letter from the President, tabled the resolution of MacLemore, warning Americans that they should not travel on armed belligerent passenger ships, and that they would do so at their own risk.

The discussion over contraband of war was extended. It is sufficient to state that all distinctions as to contraband were broken down. The discussion as to whether or not a thing was contraband was left to the judgment of the British Foreign Office. Under the belligerent right of visit and search the British found an unrestricted means of interfering with American commerce. The purpose became one of interference rather than of mere search and discovery. Orders in Council greatly extended the limits of blockade. The British Government insisted that many of the principles of blockade were unsettled, and that a belligerent could, through effective means, cut off the sea-borne commerce of the enemy. The establishment of military zones and large blockaded areas was protested by the United States. The Department of State insisted that the blockade was ineffective, that it was not impartially applied, and that it resulted in the blockade of neutral ports. The insistence of the United States upon the ordinary tests of a blockade under international law had little effect, so that the rights of neutrals were invaded, and the principle of the freedom of the seas, so far as neutrals were concerned,

became a misnomer. Is it possible for great maritime Powers, through their interference with neutral commerce and violations of neutrality, to force neutral maritime Powers into the conflict on one side or the other? Unless the power of the belligerent to police the seas is restricted, such would seem to be the fate of the neutral.

The controversy with Germany finally drew the United States into the World War. Before the departure of the *Lusitania* from New York the passengers were warned in the New York papers against booking passage thereon. The vessel was sunk without warning on May 7, 1915, and 114 American citizens lost their lives. The American Government demanded a disavowal of the act, settlement for damages, and assurances that such acts would not be repeated. The submarine was assailed as a weapon for the destruction of commerce. The German Government explained that the *Lusitania* was armed, that Canadian troops were on board, and that American citizens were used to cover war materials with a neutral protection. The American reply pointed out that only resistance to visit and search justified such an attack, and it denied that the vessel was armed. On September 1, 1915, the German Government announced that submarines would not sink vessels without warning, where there was no attempt to escape or resist. On March 24, 1916, the *Sussex*, a French vessel, was torpedoed and again a number of Americans lost their lives. The United States warned the German Government that unless it would cease immediately its submarine warfare against freight and passenger vessels, the United States would sever diplomatic relations. The response was that in the future vessels would not be sunk without warning and without saving human lives, unless escape or resistance was attempted. The German Government reserved the right to decide its future course, unless the United States could induce Great Britain and the Allied Powers to respect the principle of the freedom of the seas.

It was another case in which each belligerent held neutrals responsible for the unneutral conduct of the other belligerent. The United States replied that it could not entertain or discuss the proposition that the rights of its citizens were contingent on the conduct of other governments respecting neutrals or noncombatants. On January 31, 1917, the German Ambassador informed the Department of State that England was using her naval power to compel German submission through starvation. This he described as criminal. New situations required new decisions. After February 1st, therefore, all ships, including those of neutrals, found in a specified zone around Great Britain, Italy, and France would be sunk. There were some minor modifications. On February 3rd, diplomatic relations with Germany were severed. President Wilson informed Congress of the posture of affairs, and declared that in case of need, he would ask for authority to take the necessary measures to protect American vessels and citizens on legitimate errands on the high seas. Later he again appeared

before Congress and asked for authority to arm American merchantmen for protection. He would await the commission of an overt act before leading the country into war. Other neutral governments were not disposed to stand with the United States in the protection of neutral rights. On April 2d the President, in his war message, declared that the overt acts had taken place. Congress was called in special session. Vessels of all kinds, without regard to cargo, flag, character, destination, or errand, had been attacked and sunk without warning. The President condemned the German submarine warfare as a belligerent move against all nations, and a challenge to all mankind. After a recital of the war aims of the United States, he declared that the force of the nation would be spent to check Germany's aggression. On April 6th, finally, war was formally declared by the joint resolution of Congress.

In 1915 the Austrian Ambassador, Dr. Dumba, had been recalled at the request of the American Department of State. He had entrusted a letter addressed to his government to the keeping of a newspaper correspondent. When intercepted, the letter revealed a plan to foment strikes in the American munitions plants. The submarine question was discussed in the cases of the *Ancona* and the *Petrolite*. On April 8, 1917, the Austrian Government, as Germany's ally, broke off diplomatic relations with the United States, and in due course war was declared against Austria.

With these interferences by both of the belligerent groups, is neutrality possible and feasible? Is it worth the effort? Will it inevitably lead to war, especially in case of a maritime Power, and a maritime conflict? It is again a case of circumstances, of interests, of policy, of point of view. Until all effective states agree upon the abandonment of neutrality, those remaining outside the agreement will insist upon their right to judge for themselves as to the neutral or belligerent character of their policy, in the case of a conflict between two or more other states. This lies in the field of policy. And as long as the policy of neutrality may be elected, it follows that the status of neutrality will exist, together with its rights and duties. The belligerent states will be sufficiently active in demanding that a country be impartially neutral. The neutral state must itself insist upon an observance of its rights.

4. *The League Covenant and the Pact of Paris and Neutrality*

It is assumed by some authorities that the League Covenant has wrought a fundamental change in the law of neutrality for members of the League, and that the old neutrality, based on so-called impartiality, is a thing of the past. It is true that President Wilson envisaged a universal League of Nations, with all states joining in the pressure, and if necessary, the conflict against the aggressor state. Moreover, in explaining the refusal of England to agree to a peace with the freedom of the seas as one of the "Fourteen Points," he declared that such discussion and agreement were not necessary, as neutral-

ity would be at an end. It was a time for high hope, for great ideals, and a time when even great leaders indulged in extravagant statements. The fact is that the League is not universal, and for many years perhaps will not be. Nor has neutrality disappeared. It may be doubted that a "new neutrality" has sprung up in its place, displacing the old. Predictions of the "doom" of neutrality, even for members of the League of Nations, are a bit premature. Whatever the League may intend, there can be no assurance of what will really happen under it until the members are called upon actively to take steps against a state which has committed an act of war against all members of the League. All members of the League may so regard it. Yet some members may insist upon the right to determine their course for themselves.

Certainly Article 11, which makes any war or threat of war a matter of concern to the whole League, and Article 15, which makes an act of war against all members of the League a resort to war in violation of certain of the League's covenants, provides a new attitude toward war, and therefore a new attitude toward neutrality. War is the concern of all, and may be committed against all. So far, then, as Article 16 is concerned, it would seem that neutrality could not exist for the League member. A different attitude toward two belligerents is enjoined in the use of sanctions against the aggressor state and in behalf of the state attacked. But these measures do not necessarily imply a "new neutrality," with a different standard of conduct toward each belligerent; these are merely intermediate measures, which will lead, if pursued, to the abandonment of neutrality and the beginning of war. The essence of neutrality is still impartiality; and where impartiality begins, we find the beginning of the end, if not the end, of neutrality. Such an alteration of the neutral condition of a state is merely a half-way measure, calculated, first, to prevent resort to conflict, and second, if it must be, to join in it. There seems to be a difference of opinion among some friends of the League as to whether it has brought neutrality to an end, or whether it has substituted a new form of neutrality for the old. Manifestly it could not do both.

The greatest single contribution of the League of Nations is the statement that any war or threat of war is a matter of concern to the whole world. Tied up with Article 16, it would mean—not merely a change in the neutrality of the present and the future—it would mean the end of neutrality, and will mean this if and when all states become members of the League. It makes a conflict the business of all, and a war waged under certain conditions the war of all. It forms, to my mind, the only possible means of ending neutrality. No other instrument before or since the war, which has become effective, has provided so safe and substantial a basis on which states may agree to have an end of neutrality, and to wage war together. It is a question of fact the extent to which each country gives these two articles their enthusiastic, lukewarm, or reluctant support and approval. These provi-

sions of the Covenant must be tried out, must be put to the test, before their efficacy can be guaranteed. They exist on paper. Many nations are committed to the principle, as many American people are committed to Prohibition. But they remain untried. Then, as long as states, and especially powerful ones, remain outside the League, these provisions, even though effective within the League, cannot have the effect of ending, or necessarily of altering the legal position of neutrality. Doubtless the absence of powerful maritime states will mean caution by maritime League Powers as to their commitments on these provisions and on the general question of neutrality. Great Britain may, in a White Paper, declare that neutrality is at an end. This is not an alarming position for a state which is traditionally opposed to neutrals when it is at war. But the British Government refused adhesion to the Geneva Protocol for very strange reasons, if we take seriously the statement that neutrality is at an end. Such is the effect of the League Covenant. It offers the only practical basis of agreement. But it must become more than a mere commitment of principle within the League itself, and it must have the adhesion of other states, before it can displace or even substantially modify neutrality as we know it today.

A year ago two members of the Society, in able papers, took the position that the Pact for the Renunciation of War had made fundamental changes in neutrality and neutral rights. One took the position that the United States, for example, would not be bound by the old standards of neutral duty, in the case of a state not entitled to the benefits of the treaty, but would have the *right* to take certain measures against a violator of the pact. Indeed, these measures might become a duty. The other speaker asserted that neutrality was no longer possible, moral, or impartial, and that it was a burden too great to bear. No rehearsal of their arguments, or of the comments of the members of the Society is necessary here, except to refer to the discussion. Opinion was divided on the question whether or not the pact had wrought a fundamental change in neutrality.

The Pact of Paris does not, as I read it, affect the legal position of neutrality. Every act under it is voluntary. It is an expression of a policy, a hope, an ideal. It can hardly be classified as law. It expressly recognizes, in the reservations, the application of treaties of neutrality, and wars growing out of them, as not in violation of the terms of the pact. It makes a general renunciation, but it does not make war a matter of concern to the whole world, nor does it make any form of conflict an act of war against all the signatory Powers, as does the Covenant. To condemn, to renounce, and to seek, is not an obligation to find, or to do positive things. A state may remain neutral or not as it chooses. The Pact of Paris does not enunciate a legal principle by which the parties are bound. It is so voluntary and so general an instrument that any decision of a state to go to war, or to remain neutral, would be a valid one. It depends entirely upon interpretation, which each state reserves to itself. It contains declarations which cannot

have legal effect until such time as subsequent acts or agreements make them so.

To my mind, the strength of the Pact of Paris lies in the high policy it professes, and its contribution lies in the political field. It does not declare principles of law, and does not lie in the field of law. If a material change is desired in the legal position of neutrality, the way lies in entering the League of Nations, and in making Articles 11 and 16 universally recognized and observed. Had the end or the substantial alteration of neutrality been intended by its authors, it would have never been signed by the Government of the United States. Certainly it would never have been ratified by the Senate. A nation so committed to the principle of non-intervention that it will not join the League of Nations will not jeopardize its right to be neutral; and the legal position incident to it, through the signature of a pact of renunciation, if the effect first is understood.

Such are the legal positions of war and neutrality during the past 25 years. The conclusion is that war remains a condition to which legal consequences attach, in spite of certain changed attitudes, even though expressed in conventions. And in future international controversies the former neutral position and policy will have at least a measure of application, until our clear and manifest interests dictate our entry into the conflict. It is hard to believe that we shall always be a co-belligerent and never a neutral.

However, it must, in caution, be observed, that should the United States join the League of Nations, and should Articles 11 and 16 receive definite and effective application, our attitude toward war would be appreciably changed, although the state of war would remain; and our attitude toward neutrality would be changed altogether.

THE PRESIDENT. The discussion upon this interesting paper will be begun by Mr. Jackson H. Ralston, formerly of Washington, now of Palo Alto, of the University of Stanford.

MR. JACKSON H. RALSTON. Mr. President, ladies and gentlemen: It is with considerable embarrassment that I undertake to discuss the question of war and the question of neutrality both, all in the short space of about ten minutes. I think you will agree with me that something will probably be left unsaid; and perhaps you will agree with me when I tell you in advance that I know very little indeed about what war means. I have a very confused, uncertain idea about it; but, such as my idea is, I intend to lay before you.

In the first place, it seems to me the absolute height of absurdity to set two lines of young men opposite each other and tell them to throw things at each other for the purpose of determining great moral or any other kind of issues — absolutely absurd.

Then, again, in my ignorance on the subject, I am attracted by this situation: We regard it as highly immoral for one man, under ordinary circum-

stances at least, to kill another. We regard it as the height of morality to kill 100,000 men upon the vote of one majority in two Houses of Congress. Now, by what kind of subtle alchemy does an act, immoral when indulged in in the slightest possible way, become highly moral when indulged in in the most wholesale way imaginable? I do not know. I leave the question with you. I leave it in my ignorance on the subject, as I frankly tell you.

I have listened with a very great deal of interest to the article presented to you by my fellow Pacific Coaster, Professor Martin. He was deputed to speak to you about the recent changes wrought in the laws of war and of neutrality, at least within the past 25 years. Again I am somewhat troubled and mystified. From my point of view, the correctness of which I will not asseverate too strongly, there are no laws of war. There is a law, perhaps, of war which can be stated very simply indeed, and that is to kill, kill, kill until your opponent surrenders, and kill regardless of all laws, so-called, laid down by Hague conventions and of all laws indicated by all the writers of international law who ever lived. All those conventions, all those writings of international law, yield to the necessity of winning your case on the bloody field of battle. But a law which is subject to be set aside at any moment in the course of a contest by force, is no law at all. All the supposed laws about which we fuss and imagine and have conventions and Hague conferences, all these laws, when they are exposed to the test of actual circumstance, fall by the way. They are nothing.

So I say—I may seem to be saying this thing too strongly, but it is at least my opinion—that there are no laws of war. There are certain things we call laws of war. For instance, we say that it is wrong to poison a citizen's well; and then we poison the air, so that thousands may perish from the poison there! We say it is our place to kill in war; and if we fail to kill, and wound a man, then we indulge ourselves in the logical absurdity, if we capture him, of trying to restore him to health! Why not kill him and have done with it? It is one of the illogical features of war. We try to wound and destroy a man in the first place, and then try to restore him to health; but under it all, of course, there is a certain reason. The reason is that if we do not indulge in these particular forms of illogicality, if I may use the word, it will be the worse for us in the end. If we slay our wounded prisoners, our men when wounded and caught in the camp of the enemy will likewise be slain. So, out of some tender consideration for possible wounded in the future, we fail to carry out what would be the severe logic of our situation, and we call that fact a law. It is not law at all, except it be a practice which is dictated by what seems to be the thing which is most to our advantage. That does not constitute a law.

So these things that we call the laws of war are merely rules of practice. They are merely the thing which we think in the long run is for our own peculiar benefit; and if the circumstances are such that we think that those particular things are not for our benefit, we disregard them, just as Napoleon

slew all his prisoners at Joppa, and just as we (*sub rosa*, at least) receive reports from time to time that in the last war, when it became inconvenient to accommodate prisoners, one side or the other killed the few men they had on hand, and went on to kill somebody else.

So much for war.

Now take the subject of neutrality. I want you to look at that for a few minutes. I am going to ask you to look at it by way of a parable which has occurred to me. In the State of Kentucky, say, in the mountainous district—I make no invidious selection of Kentucky—there are two neighbors, Smith and Jones; and they indulge in a blood feud. They determine, each of them, to kill the other on sight, and to kill every member of his family. In the neighborhood is Robinson; and Robinson has the best gun, as it happens, in the whole county; and separately Smith and Jones go to Robinson to buy his gun. Robinson says, "Well, so far as your difficulties are concerned, I am neutral in thought and action. You are both friends of mine. I love you both; and the first one of you who comes to me with the price of that gun gets it." Shortly after, the waters rise, and Jones cannot get there, and Smith gets there; and he gets the gun and uses it with good effect upon the family of Jones, paying for it, of course, a suitable consideration, plus a convenient sum called for by the exigencies of the situation. Robinson, therefore, is in a very excellent position for a neutral.

Go further. Smith fires away all his ammunition. He wants more. He goes back to Robinson and says, "I want ammunition"; and Robinson says, "You can have it for a consideration. I love you, and I love Jones; I love you equally; but you are here, and he is not here. I will sell you all the ammunition you want, which of course you can afterward use against Jones. That is your affair, not mine." He sells Smith ammunition, and Smith goes and uses it; but from time to time the ammunition is loaded on a mule, and the mule is shot and killed, let us say, by Jones, and the ammunition perhaps captured, or sunk in the creek bed. It is Robinson's mule; and Robinson becomes furious, and quickly declares that he will throw off the burden of neutrality, and he will help Smith kill Jones. That is what occurs in the wilderness of Kentucky, where they do not know any better. Has anything of that kind occurred between nations, and have we called that acting the part of a neutral? I think we have.

Let us suppose another instance which may happen in the line of neutrality. Both Smith and Jones need provisions for their families. Robinson has provisions. Robinson is willing to sell to either of them. They are both good friends of his, of course, as I have explained to you; and he can sell the provisions at a profit. He undertakes to convey the provisions to one and the other; but when he tries to convey to Jones the provisions Jones wants, Smith intercepts the provisions on the way, and says to Robinson, "Here! You have no business trading with Jones. I will give you the value of those provisions, and you send your mule back." But the story

is a little different when he sells provisions to Smith. Jones catches the provisions *en route*, and kills the mule, and destroys the provisions; and Robinson, from being a neutral, becomes a belligerent.

That is the size of belligerency. We talk about the rights of belligerents, and the rights that belligerents have to cut into the rights of neutrals. In that particular instance Robinson was doing the proper thing, selling the provisions to either; and yet he could not in either case reach the market to which he desired to sell his goods. Under the laws of neutrality which are taught to us in the textbooks so often, it was perfectly all right to seize provisions under way and to pay their value, and it was perfectly all right to prevent trade with your opponent and even to destroy the vehicle upon which the trade was carried; and we call that law!

Mr. President, I think my time is up; and I am not able at this moment to find any relation whatsoever between the acts of which I have spoken and law; and yet I ought to make, perhaps, one further observation. I want to coincide most emphatically with the suggestions made earlier in the evening by Mr. Kuhn. I was afraid he was going to steal my entire speech, and do it with absolute unconsciousness on his part. Why do we not lay down as an absolute rule of action here in the United States that, irrespective of who applies to us for arms in case of conflict, irrespective of the supposed, actual, or real merits of the case, we will not allow a single pound of ammunition, a single case of munitions of war, to be sent out of this country to be used for the purpose of slaying people? The trade is an infamous one in point of fact, and yet we endorse it. It is illustrated by the instance cited here several times tonight of our sending ammunition to what was supposed to be the Government of Brazil, which did not represent the will of the people of Brazil. That mistake may occur a hundred times. At the present time the great obstacle in the way of forbidding the sale of arms by one nation to another in Europe is the United States, because they say, "Why should we agree that we will not sell arms to each other when in the background all the while is the United States, which has not stood ready to take that enlightened step?"

The PRESIDENT. Mr. Martin's paper and Mr. Ralston's contribution are both open for discussion. I might say that for many years past I have heard Mr. Ralston abolish war; and each time that he abolishes it, he seems to do it in a more taking and attractive way. Is there anybody else who would like to enter into the lists with Mr. Ralston, or discuss the paper of Mr. Martin?

A MEMBER. How about the other paper?

ANOTHER MEMBER. May we expect to have any opportunity for discussion of the papers on recognition tomorrow morning?

The PRESIDENT. Oh, yes. There will be a business meeting tomorrow. When we adjourn tonight it will be to meet tomorrow at 10 o'clock in the morning, in this room, to conduct the business of the Society, which probably

will not take us very long. If it be your pleasure to continue the discussion of the papers, and then proceed to the business, perhaps that would be the better division of affairs; but, in any event, there will be ample opportunity for the discussion of any phase of the papers read tonight which have not been adequately discussed in the opinion of others who would like to add somewhat to their consideration.

If there is no desire to continue at this time—

Professor EDWIN M. BORCHARD. Is it permissible to discuss any of these papers tonight?

The PRESIDENT. It is. I asked if there were any desire to do so at this time.

Professor BORCHARD. You mentioned only the second paper, that of Mr. Martin. I wondered whether that was intentional—whether you were excluding Mr. Hackworth's paper.

The PRESIDENT. Not at all; not at all. Would you like to discuss Mr. Hackworth's paper?

Professor BORCHARD. Yes; I should be glad to do so.

The PRESIDENT. We should be most delighted; and, in order that all may have the benefit of it, will you present yourself and look the enemy in the eye?

Professor EDWIN M. BORCHARD. Mr. President, ladies and gentlemen: We have heard tonight two very excellent papers on recognition—Mr. Hackworth's on the development of the facts of American policy, and Mr. Dickinson's, a somewhat more critical one. Mr. Dickinson in ten minutes, hardly wasting a word so far as I could see, made the most direct and the ablest criticism of our policy with respect to Russia that I have heard for some time.

If it is true that the Jeffersonian policy was based on common sense, as I think it was, I cannot see any way legitimately to exclude Russia from that policy. The American policy with respect to recognition had several aspects. It did not stand independently. It was combined with the policy of non-intervention in the affairs of other people, and also of neutrality in foreign contests. That is to say, we did not assume a "holier-than-thou" attitude. We did not assume that we could tell the rest of the world how to govern itself, and what kind of institutions were best for its people. We realized both the futility and the inadvisability of such an attempt. By the policy of recognizing facts as they are we paid deference to that which was incontrovertible and inevitable; and I think that evidences good common sense. The moment we endeavored to depart from that policy and made recognition conditional upon the conformity of foreign people's conduct or administration with what we thought was moral or right, we not only began to intervene in the affairs of foreign people, but we became unneutral, and we made enemies right and left, which is the direct consequence of so inadvisable a policy as endeavoring to condition recognition upon the conformity of foreign peoples with our views as to what they ought to do.

So far as I can judge, the policy with respect to Russia had to justify itself on a practical basis—namely, that they would soon disappear, and that our unfriendly act of refusing to recognize the facts would justify itself and help along their disappearance. It does not appear to have done so, however; hence it seems to me to become necessary to change the policy. As Mr. Dickinson so well said, recognition has no relation whatever to your liking or not liking the people whom you recognize. We do business all the time, every day, most of us, with people for whom we have no special predilection; but it is necessary for us to deal with all kinds of people. That is more particularly true of nations, for it involves more important questions. Mr. Dickinson has listed the variety of kinds of governments that we have recognized, including pirates—almost openly and avowed pirates, racketeers in their day. We were not terribly shocked. We did not like it, I am certain; but we had to do business with those people. I believe, too, that the continuance of the policy of obscurantism merely promotes the very evil or disagreeable fact that we should like to get rid of. I can see, therefore, no practical justification for it; and if there is one thing that this country has evidenced in the past, it has been a certain degree of practicalness, also integrity. I find both these impaired by the present policy with respect to Russia.

So far as concerns the confiscation of private property, revolutionary governments have done that from time to time; and I venture to recall the fact that not so many years ago most of the great Powers of Europe undertook a confiscation of private property on a scale never before known, which makes the Soviet confiscation rather unimportant in comparison, especially in the light of the principle for which these great Powers stood, namely, the protection of private property. So far as concerns the repudiation of debts, I have heard of that before. I have heard of that even in my own country; and I have not heard of any government that withdrew its recognition from the United States when several of our states repudiated their debts. It has given an opportunity to the Council of Foreign Bondholders in London to level rather pointed and derogatory remarks at the United States, but it did not result in a withdrawal of recognition. I take it that both those Russian policies are not confirmed and permanent policies. They are willing to talk about them and negotiate and the amounts involved are not excessive.

So far as concerns the capability of performing international obligations as a condition of recognition,—and I am not impressed with the sincerity of the argument—not so many years ago several of the great Powers of Europe came to Washington and maintained that they were quite unable to perform their international obligations of paying the debts for which the United States held signed notes. They said they could not pay those debts; that is, they could not perform those international obligations. Did we withdraw recognition? Not at all. We simply reduced the size of the debt, rather considerably in some cases. I take it that the Russian Government is quite pre-

pared to enter into a similar agreement. Indeed, they have indicated that they would. They have also indicated, I think, that they would arbitrate the question of the confiscation of private property. They have also indicated that they had certain counter-claims against us, which the United States probably will not refuse to consider.

Heretofore, in dealing with nations, such matters have been the subject for discussion; and I submit that the United States has reached a stage of strength and competence to take care of itself that it certainly does not need to fear that by talking to those people we are going to suffer either degeneration or defeat. Revolutionary governments necessarily believe they have found a new El Dorado. The liberty of fulmination is incidental to revolution. Nothing said by the Soviets in defiance of established institutions can exceed the denunciations and proclamations of the leaders of the French Revolution over a century ago.

The Soviets are there. We did not put them there. They are in the seats of power, and so far as I can see they are likely to stay there for some time. It is distinctly an unfriendly act, in my humble judgment, to withhold recognition from a government that has lasted as long as they have. That is quite unusual. Even in the case of assassinations of the heads of states, which is a practice not altogether favored in international relations, recognition has been extended after a time, and sometimes rather promptly. People will do lots of things of which we do not approve, and I know of no way to help that; but when a fact has occurred, when a fact is with us, it seems to me the barest practicality and common sense to recognize that fact and deal with it.

To be sure, no foreign government has any moral or other right to conduct a propaganda to undermine the government that recognizes it. I take it that most of our people do not fear for our institutions so greatly that they believe that this government can be undermined because a Russian ambassador will be around here, or even because Russian subjects will be admitted to the United States. We have some capacity to take care of ourselves, I infer; and if propaganda should be conducted to a point where it becomes obnoxious, I take it there are methods of controlling that. I can see nothing insuperable about that particular condition, while admitting that of course we have a perfect right to and should resist the attempt to undermine this government by a foreign government.

My main argument in support of the change of a policy that has not justified itself by experience is that the facts now point to a changed situation. The facts are beyond dispute; and if we believe in the validity of the Jeffersonian principle, which, as I venture to say, had fine foundations in common sense, we ought to substitute a policy of broadmindedness for a policy of narrowmindedness. I say that without any criticism of any particular administration; but I think the time has come for public opinion to look upon this question without prejudice, with open eyes, and in the light of American traditions.

MR. HOWARD T. KINGSBURY. Mr. President, I should like to reply very briefly to the remarks made by Professor Borchard. I think we may freely admit that the Soviet Government of Russia is, and has been for ten or a dozen years, a *de facto* government; that it came into power by means no more revolutionary than did the first French republic; and that it is no concern of ours what system of property or what system of government or what system of religion or atheism it may choose to establish and support in its own confines. But so far as the question of the repudiation of debts is concerned, it seems to me that the analogy which Professor Borchard sought to draw between the repudiation of state debts by some of our states, never ratified in any way by the general government, and the repudiation of national debts by the Russian Government, simply does not hold; and that any government which deliberately repudiates its own debts—not the debts of its constituent states or its individual cities—has no right to demand or reason to expect recognition by other governments until it signifies its willingness to recognize the debts, even if it cannot at the moment fully pay them.

But the question that seems to me the most important of all is this: There is apparently a well-founded belief that the Soviet Government, or the so-called Third Internationale, which is almost another name for the Soviet Government, does deliberately intend to introduce a policy of subversion of all other governments founded upon what it calls capitalistic principles or the capitalistic system, and that it seeks to infiltrate this belief, this doctrine, into all other countries. It may well be, I hope it is the fact, that we are strong enough to resist and suppress any such attempts here; but so long as that doctrine is declared, and certainly is not repudiated, by the Soviet Russian Government, there is no reason why we should facilitate it by giving them recognition and admitting them into our fellowship in that way.

When one nation is admitted into the fellowship of other nations by recognition, it is always, it seems to me, upon the implied agreement of that nation to play the game according to the rules. It seems to me that Soviet Russia has really served notice on the rest of the world that it does not intend to play the game according to the rules.

MR. JOHN NICOLSON. Mr. President, early this morning I was spoken to by a prominent member of the D. A. R., a lady who is nationally known. She handed me a paper which is peculiarly appropriate to the discussion now on, and she handed it to me with the statement, "It contains facts which you gentlemen ought to know." I did not know them. I have since read them. The statement has just been made that the appeal should now be made to public opinion. If the appeal is to be made to public opinion, I respectfully submit the public ought to know some of the real facts, as distinguished from generalizations.

This paper is entitled *World Revolution*. I am going to read only a very little from it. It is from the *Text-Book for the City Schools of The Party*

—*A. B. C. of Leninism*, by two Russians whose names the Secretary can enter in the minutes from the printed sheet.

(The names are P. Kerjenzov and Leontyev.)

Mr. NICOLSON. This is the sixth edition, the 685th thousand. This is only Chapter 4 of this book; and in it we find such things as these. They speak of the dictatorship of the proletarian government:

In order to take the first steps toward socialism it is necessary to confiscate factories and mills, to make the land the property of the state, to remove the bourgeoisie from positions of authority, to smash the whole bourgeois governmental machinery. How can the bourgeoisie accept all this? Of course it will fight fiercely against all such things. Only the seizure of governmental power by the proletariat can lay the foundation for freeing mankind from exploitation.

One task is "the organization of armed insurrection to seize governmental power and to crush the exploiters." The text reveals that "exploiters" means the so-called capitalistic crowd; but that is not limited in their concept, sir, to the multi-millionaire by any means. They extend that concept to the so-called kulaks; and a parenthetical interpretation reveals that the kulaks are only well-to-do peasants.

Another task is: "When the ruling classes have become sufficiently entangled and have disgraced themselves enough"—that means in the eyes of the proletarians, of course—"and have no power to live and to rule as of old, and the Opportunist elements in between have bared their failure to all—then the time for proletarian revolution is ripe."

Again: "It is important that the entire country"—that is to say, the country where they expect to bring about this revolution—"should be passing through an acute political and economic crisis"—certainly the economic crisis exists in most countries at the present time—"which usually draws even the most backward strata of the population into the political struggle. When such conditions are present, it is the moment for the last and decisive battle of all in which millions of people of all classes take part. Then the hour for the proletarian revolution is striking."

Again: "The bourgeoisie organize military intervention by other countries. The proletariat has to exert its energy in civil war for a long time,"—before they bring about their goal—"and only a strong government and stern measures, not excluding the Terror, can give victory over the exploiters."

Passing to another point, they say:

The third task of the dictatorship of the proletariat is the destruction of the bourgeois state, with its governmental organs, the police, army, officials; and the proletarian democracy. The bourgeois system is strong because it has numerous organizations supporting and defending it.

Again:

The proletariat must smash all these organizations and disperse these lackeys of the exploiters, and build their own new state. With the aid of the dictatorship of the proletariat they organize their political power and create a Soviet State.

* * * * *

Only the dictatorship of the proletariat allows the carrying out of all these measures. Only through violence was it possible to nationalize factories and the means of transportation, to seize banks, to confiscate the land of the landowners, to put a bridle on the kulaks (well-to-do peasants. T.).

I will not read more, Mr. President. I have read this much only to indicate the nature of this document, handed to me by a very eminent and nationally known lady of the D. A. R., with the suggestion that you gentlemen ought to know some of the facts. I agree with her, especially if we are to make the appeal to public opinion as suggested by our good friend Mr. Borchard.

Furthermore, Mr. President, the distinction cannot be overlooked: Hesitation in the recognition of another government because we do not like their internal affairs is very different from the question of recognizing one which has its purpose of making an attack upon us, demolishing us, murdering us physically as well as politically.

May I have the privilege of inserting in the record some additional quotations from this book, not many of them? The lateness of the hour precludes my reading them.

The PRESIDENT. I suppose there is no objection to reading them into the record.

(The additional extracts referred to by Mr. Nicolson are as follows:)

The seizure of political power by the proletariat is the starting point of the intermediate period. The working class can seize governmental power only through armed insurrection.

* * * * *

It is necessary that the exploited should realize the impossibility of living as formerly and that the basic masses of the workers be ready to face death in order to overthrow and vanquish the bourgeoisie. This activity of the masses is usually connected with their condition becoming worse.

* * * * *

Dictatorship in its correct meaning is limitless power which rests not on law but on force.

* * * * *

THE TASKS OF THE PROLETARIAN DICTATORSHIP

What tasks are faced by the proletariat on the day after the final victory? The very same that face any army winning a battle. It is necessary to kill the enemy outright, to deal him such a blow as shall for all time deprive him of the strength and the opportunity to resist. It is necessary to destroy the "man power" of the enemy, to deprive him of arms, ammunition and provisions. To cut off his means of transportation. Make his leaders and their staffs captive. Disorganize his armed hosts and frighten his adherents.

The first task of the dictatorship of the proletariat is the merciless crushing of the exploiters. The bourgeoisie, vanquished in open battle, employ cunning in order to harm the government of the working class.

THE PECULIARITIES OF THE INTERMEDIATE PERIOD

The Economic Problems of the Proletarian Dictatorship

The proletariat uses the conquered power as a lever for effecting economic reconstruction, that is, to reorganize capitalistic economics into socialistic. The point of departure for this economic revolution is the expropriation of the property of landowners and capitalists, that is, the passing over to the proletarian state of land and all the means of production (factories, mills, transportation, etc.).

These are the basic economic tasks of the dictatorship of the proletariat: the confiscation (taking without compensation) of all important factories and making them the property of the proletarian state. The same with the means of transportation and communication (the telegraph and telephone).

The land of the landowners, churches, monasteries, passes into the possession of the proletarian state; a part of this land is given over to the poor and middling peasants for their use. The other part is used to establish the great Soviet farms.

Buying and selling of land is prohibited. The nationalization of the land, that is, its passing into the possession of the proletarian state, is effected.

In the field of trade and credit the following measures are taken; all banks pass into the hands of the state and are merged. Wholesale trade is assigned to the organs of the Soviet State. Foreign trade is monopolized. All government debts to foreign and domestic capitalists are repudiated.

The press and publishing business pass into the hands of the state. Printing establishments, large theatres, moving picture houses, etc., as well.

Large houses are confiscated and are given over to the local Soviets. The workers are installed in bourgeois sections. Palaces and large public and private buildings are assigned to workers' organizations.

The working day is shortened to 7 hours, and in dangerous occupations even more. The workers' control over economic life is organized.

MR. WILLIAM C. DENNIS. Mr. Chairman, it comes to my mind that a few years ago, when you and I were in the Department of State, the Department of State withdrew its representatives from Venezuela on the ground that those representatives no longer had any useful mission there in view of the action of President Castro. It is further in my mind that a few years ago (in 1904) the Japanese Government withdrew its representatives from Russia on the ground that that representation had ceased to possess value. I submit that that was a perfectly normal action in both cases. We may have been right, or we may have been wrong. Japan may have been right or may have been wrong in withdrawing her representatives; but that is the sort of thing which happens when a country concludes that representation is not useful.

I submit that there is exactly the same right to refuse to give representation and recognition in the first place that there is to withdraw it afterward. Without arguing this phase, I submit that no one is seriously suggesting now—certainly no one in connection with the United States Government, I think, has ever suggested—that we have any right to intervene in the affairs of Russia to determine their form of government, their economic system, their religious system, or anything of that sort; but the very same doctrine which prevents our interfering in any way certainly requires as a comple-

mentary feature that they discharge their international obligations toward us.

Whether they have discharged them or not is a question of fact. It has been suggested by Professor Dickinson that they are ready to discharge them generally, but not specifically. That is like the difference between degree and kind. Justice Holmes once said, I believe, that a difference in degree can become so great that it is a difference in kind. It is just a question of the facts of the particular case whether representation has value in a country which is unquestionably, as the record I think shows, under the control of a party which also controls a party in this country which is definitely attempting to overthrow this government by force.

We do not think the Communists can harm us; it is ridiculous to think that they can, but the fact that an enemy may be impotent does not make him a friend. If we see fit to take the ground that it is useless for us to discuss diplomatic affairs under those circumstances with the government which seeks to destroy us, I submit that that is a perfectly proper position to take. It is not a departure from our long-standing Jeffersonian theory of recognition at all. This is not an exception. It may be an incorrect application of judgment to the facts. That is arguable easily. It may be that we would better lead the Communists to sweetness and light by recognizing Russia. That, I think, would be Mr. Borchard's argument and Mr. Dickinson's argument. But suppose we do not believe that, and believe that the best way to lead them to sweetness and light is to wait a while. Technically, we certainly have a good ground for delay as long as the organization which controls the government of Russia also is endeavoring to overthrow this government.

I submit, as a legal proposition, that is inescapable. As to a practical policy,—what is the best thing to do, what is the best way to sell Russia steel and farm machinery—of course that is quite another matter.

The PRESIDENT. Is there any desire for further discussion?

Professor ELLERY C. STOWELL. Mr. President, it seems to me that these precedents dating back over a hundred years are not always controlling. There has come a change over our international relations. I think there has come a change in the attitude of states. There is a larger coöperation needed; and with that larger coöperation there comes a greater necessity of looking at the conditions, the power of coöperating in the state to be recognized. I submit, from what I can learn from first-hand observers, without any prejudice, as nearly as I can make out, that the conditions of tyranny and the methods pursued by the Russian Government make it one that I think is not to be looked to for coöperation along the lines that we wish to pursue. That being the case, I think it should make us reluctant to recognize the Russian Government.

Passing to some of the other phases of recognition, of course we had a very fine statement from the legal representative of the Department of

State; but he could not, perhaps, very well—I do not wish to imply that he would like to—make a distinction which I can make, having no official position of any kind: That in dealing with these questions of recognition you must take into account the nature of the states with which you are dealing. He indicated that when he spoke of the particular arrangement with the five Central American States. The fact that in that case there is a treaty does not change the situation. In fact, we are not a signatory to that treaty, indicating thereby that we follow a different policy with those five states. We must follow a different policy with different types of states, states which do not fulfil their international obligations with the same independence, with the same completeness, that do certain other states. You must take that into account. It seems to me that we cannot get any proper understanding of recognition without that.

Just one more point on the question about policy. It is constantly stated that recognition is a policy, and it is so spoken of in the paper. There is a right to recognition. If you do not recognize the state that has a right to be recognized, or if you do not recognize the state that has conditions under which it is generally considered proper to be given recognition, then that state may use reprisals against you, and will be justified in so doing. There have been such cases on record. That comes within the definition of an international right, something that is observed in practice, and is enforced when there is an attempt to depart from it. There being, then, a right of recognition, the question whether we will accord that right, whether we shall ourselves recognize that there is that right and accord recognition, is for the discretion of the particular state, just as the executive has a wide discretion in enforcing any law, or almost all of our laws. Nevertheless, recognition is a part of international law; and in carrying it out the separate states do exercise a certain degree of policy; there is a leeway. That is the policy part; but recognition is a matter of law.

The PRESIDENT. Is there a desire to continue the discussion? (After a pause) If there be no desire to proceed with the discussion this evening, the Chair will declare the meeting adjourned until 10 o'clock tomorrow morning.

(Thereupon, at 10.45 o'clock p. m., an adjournment was taken until tomorrow, Saturday, April 25, 1931, at 10 o'clock a. m.)

FIFTH SESSION

Saturday, April 25, 1931, 10 o'clock, a. m.

The meeting was called to order at 10 o'clock a. m., in the Willard Room of the Willard Hotel, President James Brown Scott presiding.

The PRESIDENT. The morning session of the American Society of International Law will now come to order. There will be a continuation—and, hopefully, the program prints “conclusion”—of discussions of preceding papers; the papers designated being the two of last evening on “The policy of the United States in recognizing new governments during the past twenty-five years,” and “The legal position of war and neutrality during the last twenty-five years.”

After the discussions have been concluded we will consider ourselves as in business meeting, and take up each of the topics mentioned in the five items listed in the order of business.

Professor JESSE S. REEVES. Mr. President, there seems to be some delay in members arriving. I am wondering if it would not be possible for us to proceed with our business first, and then return to the unfinished business by way of discussion. I so move.

The PRESIDENT. Is there a second to that motion?

(The motion was seconded and carried.)

The PRESIDENT. The first item on the agenda is the report of the Committee on Codification of International Law. The Chair calls upon Mr. Reeves, chairman of that committee.

(Professor REEVES read the report of the committee, as follows:)

REPORT OF THE COMMITTEE ON CODIFICATION OF INTERNATIONAL LAW

At the last meeting of the Society no formal report was presented due to the fact that the chairman had not returned from the Codification Conference at The Hague. In lieu thereof, other members of your Committee on Codification who were technical advisers at the conference at The Hague, together with Mr. David Hunter Miller, chairman of the American delegation to that conference, gave accounts of the work of the recently concluded conference. During the past year sufficient time has elapsed to appraise that work and to consider the prospects for its continuation. The conference itself made certain recommendations by resolution, adopted April 12, 1930, which proceeds upon the general idea that the process of codification should be continued:¹

I

The Conference,

With a view to facilitating the progressive codification of international law,

Recommends

That, in the future, States should be guided as far as possible by the provisions of the Acts of the First Conference for the Codification of International Law in any special conventions which they may conclude among themselves.

II

The Conference,

Highly appreciating the scientific work which has been done for codification in general and in regard to the subjects on its agenda in particular,

¹ Resolution of the First Conference for the Progressive Codification of International Law, The Hague, April 12, 1930. (C. L. 21. 1931. V. Annex 2.)

Cordially thanks the authors of such work and considers it desirable

That subsequent conferences for the codification of international law should also have fresh scientific work at their disposal and that with this object, international and national institutions should undertake at a sufficiently early date the study of the fundamental questions of international law, particularly the principles and rules and their application, with special reference to the points which are placed on the agenda of such conferences.

III

The Conference,

Considering it to be desirable that there should be as wide as possible a coördination of all the efforts made for the codification of international law,

Recommends

That the work undertaken with this object under the auspices of the League of Nations and that undertaken by the Conferences of American States may be carried on in the most complete harmony with one another.

IV

The Conference,

Calls the attention of the League of Nations to the necessity of preparing the work of the next conference for the codification of international law a sufficient time in advance to enable the discussion to be carried on with the necessary rapidity and in the light of the information which is essential.

For this purpose the Conference would consider it desirable that the preparatory work should be organized on the following basis:

1. The committee entrusted with the task of selecting a certain number of subjects suitable for codification by convention might draw up a report indicating briefly and clearly the reasons why it appears possible and desirable to conclude international agreements on the subjects selected. This report should be sent to the Governments for their opinion. The Council of the League of Nations might then draw up the list of the subjects to be studied, having regard to the opinions expressed by the Governments.

2. An appropriate body might be given the task of drawing up, in the light of all the data furnished by legal science and actual practice, a draft convention upon each question selected for study.

3. The draft conventions should be communicated to the Governments with a request for their observations upon the essential points. The Council would endeavour to obtain replies from as large a number of Governments as possible.

4. The replies so received should be communicated to all the Governments with a request both for their opinion as to the desirability of placing such draft conventions on the agenda of a conference and also for any fresh observations which might be suggested to them by the replies of the other Governments upon the drafts.

5. The Council might then place on the programme of the conference such subjects as were formally approved by a very large majority of the Powers which would take part therein.

The future of codification was considered in a report of the First Committee of the Eleventh Assembly of the League of Nations, and the following resolution was adopted by the Assembly on October 3, 1930:²

I. PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW

The Assembly has taken note of the work of the Conference which was held at The Hague in March and April, 1930, as a result of the initiative taken by the Assembly by its resolution of September 22nd, 1924, regarding the progressive codification of international law.

It reaffirms the great interest taken by the League of Nations in the development of international law, *inter alia*, by codification, and considers it to be one of the most important tasks of the League to further such development by all the means in its power.

The recommendations made by the Conference contain suggestions of the highest value, and must be taken into account in examining what would be the best methods for continuing the work which has been begun.

The Assembly accordingly decides to adjourn the question to its next session, and requests the Council, in the meanwhile, to invite the Members of the League of

² Resolution of the Eleventh Assembly of the League of Nations, October 3, 1930.

Nations and the non-Member States to communicate to it, if they so desire, their observations on these suggestions, in order that these observations may be taken into consideration by the Assembly.

In accordance therewith the Council of the League, January 19, 1931, instructed the Secretary General to secure the suggestions of the various governments, members of the League and non-member states, for the future progress of codification, that such suggestions and observations might be available when the matter is discussed at the meeting of the Assembly the coming September. The circular letter of the Secretary General has asked that the suggestions and observations of the various governments be in his hands before July 1st, in order that they may be circulated in sufficient time before the opening of the session.

The Governments are invited to examine in particular certain recommendations regarding the progressive codification of international law which were formulated by the Codification Conference held at The Hague, in March-April, 1930, and the draft resolutions proposed by various delegations in the First Committee of the Assembly which the Committee annexed to its report. The Council further decided that the attention of the Governments should be called to the fact that the task of the Assembly would be greatly facilitated if it had before it positive suggestions as to the organization which might be adopted and the procedure which might be followed.

Your committee takes notice of the expression of opinion of the Hague Conference set forth in its resolution quoted above, in which, after recognizing the value of the scientific work done preparatory to the conference suggests:

That subsequent conferences for the codification of international law should also have fresh scientific work at their disposal and that with this object, international and national institutions should undertake at a sufficiently early date the study of the fundamental questions of international law, particularly the principles and rules and their application, with special reference to the points which are placed on the agenda of such conferences.

This Society has not the facilities to engage in scientific work of the character suggested. It has, however, in many ways encouraged and endorsed the work of the Harvard Research in International Law. The work of the Harvard Research was not concluded by the preparation of its draft conventions and reports preparatory to the Conference of 1930. It had already organized work upon four additional topics which the Preparatory Committee of the League of Nations had deemed suitable and ripe for codification, namely, diplomatic privileges and immunities, piracy, the legal positions and functions of consuls, the competence of courts in regard to foreign states. This work has been continued uninterruptedly and is not yet completed. Having in mind the observation included in the resolution of the Hague Conference quoted above, the Advisory Committee of the Harvard Research in International Law adopted the following resolution at its meeting February 22, 1931:³

The Advisory Committee of the Research in International Law, Harvard Law School, takes great satisfaction in the inauguration of the task of codification of international law, provided for in the resolution of the Fifth Assembly of the League of Nations, of September 22, 1924, and begun by the Conference on Codification of International Law held at The Hague in March and April, 1930.

The Advisory Committee was organized to explore, from a scientific and non-governmental point of view, the subjects which have been or may be considered with a view to codification; it has already published drafts of conventions on the three subjects on the agenda of the Hague Conference in 1930, and is now engaged in the preparation of such drafts on four additional subjects pronounced to be "ripe" for codification by the League of Nations Committee of Experts on the Progressive Codification of International Law; *viz.*, Diplomatic Privileges and Immunities, Piracy, Status of Consuls, and the Competence of Courts with Regard to Foreign States.

³ Resolution of the Advisory Committee of the Research in International Law, Cambridge, Mass., February 22, 1931.

The Advisory Committee is of the opinion that the continuation of the codification movement is essential to the satisfactory development of international law; to this end, it expresses the hope that arrangements will soon be begun for a second conference on codification of international law.

The Advisory Committee also expresses the hope that the preparations for a future conference will be such as to provide for the fullest possible scientific exploration of non-governmental bodies.

With this resolution, your committee finds itself in hearty accord. It notes with satisfaction the continuation of the work of the Harvard Research in International Law and bespeaks for it continued encouragement and coöperation by this Society. Your committee also notes with great satisfaction that the results of the work of the Harvard Research have been printed as a supplement to the *American Journal of International Law* and it hopes that subsequent results of the research may likewise be published as supplements to the *Journal*.

Your committee has taken into consideration the request of the Council of the League of Nations for suggestions and observations on the part of various governments, such replies to be in the hands of the Secretary General of the League of Nations before the 1st of July, 1931. Your committee hopes that the Government of the United States will continue to show its interest in the work of the progressive codification of international law, both as to the process inaugurated under the auspices of the International Conferences of American States as well as under the auspices of the League of Nations, and as to the latter that the Government of the United States indicate, as requested, its observations and suggestions for future conferences.

Having in mind the importance of the continuation of the work of codification, and realizing the non-official character which your committee and this Society have, your committee nevertheless makes the following recommendations as to the future work of codification:

(a) That a second conference on the codification of international law should be held in 1935, and that a series of future conferences should be planned at intervals of five years.

(b) That only one topic, or at most two topics, should be placed on the agenda of the next conference, and that this topic or topics should be chosen from among those already selected as "ripe" for codification by the League of Nations Committee of Experts on the Progressive Codification of International Law.

The Hague Conference, in the resolution quoted above, recommended "that the work undertaken under the auspices of the League of Nations and that undertaken by the Conferences of American States be carried on in the most complete harmony with one another." The committee finds itself in complete accord with this recommendation. The work under the auspices of the Conferences of American States has resulted in the signature of a complete code of private international law and of a series of conventions in public international law signed at Havana in 1928. These conventions were as follows: on the status of aliens, asylum, rights and duties of states in the event of civil strife, consuls, diplomatic officers, maritime neutrality, and treaties. These conventions have been ratified as follows: Asylum, consuls, and diplomatic officers, by Brazil, Mexico, Nicaragua, and Panama; the status of aliens, by Brazil, Nicaragua, Panama, and the United States; the rights and duties of states in the event of civil strife, by Brazil, Mexico, Nicaragua, Panama, and the United States; treaties, Brazil, Nicaragua, and Panama; maritime neutrality, by Panama and Nicaragua. Colombia has ratified the conventions on aliens and civil strife, ratifications not yet deposited; Mexico has ratified that on aliens, ratification not deposited; and Venezuela's ratification of that on diplomatic officers has been authorized. In addition to the two conventions ratified by the United States, namely, on aliens and the rights and duties of states in the event of civil strife, those on consuls and maritime neutrality were submitted to the Senate. Those on asylum, diplomatic officers, and treaties were not.

The Sixth Pan American Conference made arrangements for the continuation of codification:⁴

⁴ Sixth International Conference of American States, Final Act, 176.

The Sixth International Conference of America States resolves:

First: That the future formulation of international law shall be effected by means of technical preparation, duly organized, with the coöperation of the committees on investigation and international coördination and of the scientific institutes hereinafter mentioned.

Second: That the International Commission of Jurists of Rio de Janeiro shall meet on the dates which may be appointed by the respective governments, for the purpose of undertaking the codification of public and private international law, the Pan American Union being entrusted with furthering the agreement necessary to bring about its meeting.

Third: That three permanent committees shall be organized, one in Rio de Janeiro, for the work relating to public international law; another at Montevideo, for the work of dealing with private international law; and another in Habana, for the study of comparative legislation and uniformity of legislations. Said bodies shall have the following functions:

(a) To present to the governments a report or statement of the matters which are ready for codification and legislative uniformity comprising those definitely subject to regulation and formulation, as well as those regarding which international experience and the new principles and aspirations of justice may indicate require prudent juridical development.

This report would be presented for the purpose of having the governments indicate which matters they deem susceptible to study to the end that they may be used as a basis in the formulation of conventional rules or fundamental declarations.

(b) To classify, in view of the aforementioned statement and of the answers given by the governments, the matters submitted to discussion, in the following form:

1. Subjects which are in proper condition for codification, because they have been unanimously consented to by the governments;

2. Matters susceptible of being proposed as subject to codification because, although not unanimously endorsed by, they represent a predominant opinion on the part of most Governments;

3. Matters respecting which there is no predominant opinion, in favor of immediate regulation.

(c) To present to the governments the foregoing classifications, in order to learn their general views as to the manner in which the juridical problems of codifiable matters could be enunciated and resolved, together with all juridical, legal, political, and diplomatic data and antecedents which may lead to a full clarification of the subject.

(d) To solicit and obtain from the National Societies of International Law scientific opinions and general views on the regulation and formulation of the juridical questions entrusted to the committees.

(e) To compile all the aforementioned material for its transmission, together with draft-projects thereon, to the Pan American Union, which shall submit them to the Executive Council of the American Institute of International Law to the end that through a scientific consideration thereof the latter may make a technical study of such draft-projects and present its findings and formulas, in a report on the matter.

Fourth: That the opinion of the Inter American High Commission shall likewise be heard, as that of a technical coöperative body, on those matters of an economic, financial and maritime nature.

Fifth: That after said studies and formulas are presented, they shall be communicated to the governments, which may agree upon the advisability of convening the Commission of Jurists, or else have them incorporated into the program of a forthcoming International Conference.

Sixth: That in order to include in the program of the International Conferences of American States the matters susceptible of codification or uniformity of legislation, and also for their incorporation into the agenda of the Commission of Jurists, whenever agreed upon, it shall be necessary that the governments have the draft-projects and antecedents for study at least one year in advance.

Seventh: That the three aforementioned committees shall be constituted by the governments with members of the respective National Societies of International Law. Communication with the Governments and with the Executive Council of the Institute shall be conducted through the Pan American Union.

Eighth: That a Commission of Jurists, learned in the civil legislation of the American countries, may be constituted whenever deemed advisable, in order to undertake the study of said legislation and the drafting of a project of uniform civil legislation for the American nations, especially those of Latin America, choosing the proper means to obviate the inconveniences resulting from the diversity of legislations.

Ninth: That the Pan American Union, in so far as its statutes may permit, shall coöperate in the preparatory work to which the foregoing articles refer.

This resolution envisages a long process of preparation prior to an additional step of formal codification by the International Commission of Jurists with ultimate reference to a future International Conference of American States. It does not appear at the present time that there have been activities along the lines provided for by this resolution of Havana.

As the United States has coöperated in both codification undertakings, it seems to your committee that the Society might well place upon its program for discussion at a future meeting the question as to the advisability of two codification instrumentalities. Such a topic involves the question as to whether or not there is a separate, even though supplementary, body of international law which can be claimed to be American, as distinct from general or universal public international law. The committee is not disposed to make a comparative estimate of the two distinct processes of codification judged by the results thus far achieved, but it is clearly of the opinion that procedures so difficult as those involved in the codification of international law should be in no sense competitive.

Finally, the committee is not discouraged as to the prospects of progressive codification of international law notwithstanding the modest positive result at the Hague Conference of 1930, nor, on the other hand, of the seeming reluctance of the American Republics to ratify the conventions signed in Havana. It endorses the spirit which seeks to carry on this important work, which, discussed for more than half a century, has only begun to show tangible results.

Professor REEVES. I offer the following resolution:

Be it resolved that, The American Society of International Law expresses the hope that the Government of the United States will, in its reply to the letter of the Secretary General of the League of Nations of February 27, 1931, give the largest possible encouragement to the continuation of the work of codifying international law begun by the Hague Conference of 1930. If the results up to the present time have not advanced the codification of international law as far as many had hoped for, the Society is nevertheless of the opinion that the work of codification cannot be completed by any one conference, or, indeed, by any one generation, and it urges the general realization of the wisdom and necessity of continuing this effort.

The PRESIDENT. Ladies and gentlemen, you have heard the report. What is your pleasure—that it be received and filed?

Mr. CLOUD R. MARSHALL. I will second the resolution which I understand Mr. Reeves offered at the conclusion of the report on behalf of the committee.

The PRESIDENT. I was coming to that. If there is no objection, the report will be received and filed. We pass on to the question of the resolution. I understand that it has already been seconded by Mr. Marshall.

Mr. MARSHALL. I take it that it is moved by the committee and submitted, and I will second it.

The PRESIDENT. Is there any discussion?

Professor MANLEY O. HUDSON. Mr. President, I should like to suggest that we adopt the resolution, and that the President of the Society appoint a committee to convey the resolution to the Secretary of State.

The PRESIDENT. Will you accept that as an amendment?

Professor REEVES. Certainly.

The PRESIDENT. It has been moved and seconded that the resolution, as amended, including the appointment of a committee, should be passed. Is there any discussion?

(The motion was carried.)¹

REPORT OF COMMITTEE ON HONORARY MEMBERS

The PRESIDENT. The next item of business upon the agenda is the report of the Committee on Honorary Members. The chairman of the committee, Mr. Kuhn, was obliged to return to New York. He has, however, requested the Secretary of the Society to present the report in the name and in behalf of the committee—Mr. Finch.

Secretary FINCH. Mr. President, Mr. Kuhn asked me to do that in case there were no other member of the committee here. There are two other members—Mr. Dennis and Dr. Hill. I have not seen them in the room. If they are not here I shall be glad to comply with the request of the chairman. (After a pause):

The Committee on Honorary Members reported to the Executive Council, at its meeting on Thursday, the name of Mr. Adatci, of Japan, to be an honorary member of the Society. The Society, under its constitution, has the privilege of electing one honorary member each year. The Council approved that recommendation, and authorized the committee to report the name of Mr. Adatci to the Society this morning for election as an honorary member.

I am sorry I cannot give as full an account of the reasons of the committee as the chairman himself would give; but, as I remember what he said in the Council, the recommendation was made first of all because of Mr. Adatci's achievements in the field of international law. I believe the statement was made that he is the outstanding authority on international law in his own country. Secondary reasons were some of the connections which he has had for a long time, one of them being an active membership in this Society for many years. It was also mentioned that he has recently been elected a member of the Permanent Court of International Justice at The Hague and is now its president.

In connection with the report of the committee, the Council discussed whether the idea of geographic representation in this honorary membership entered into the recommendations which we have acted upon in the past; and I think it was distinctly understood that that had nothing to do with this recommendation, and that honorary membership is in no way a recogni-

¹ The resolution was presented to the Secretary of State, May 9, 1931, by the following committee: Dr. James Brown Scott, Washington; Professor Joseph W. Bingham, Stanford University; Dean Charles K. Burdick, Cornell University; Mr. Charles C. Burlingham, New York; Mr. Frederic R. Coudert, New York; Mr. George A. Finch, Washington; Professor James W. Garner, University of Illinois; Professor Manley O. Hudson, Harvard Law School; Professor Philip C. Jessup, Columbia University; Mr. Howard Thayer Kingsbury, New York; Mr. Arthur K. Kuhn, New York.

tion of countries or particular geographical territories, but of the outstanding accomplishments of the individual as entitling him to such an honor by this Society.

Mr. President, if that is a sufficient explanation, I should like, on behalf of Mr. Kuhn, the chairman of the committee, to present the name of Mr. Adatci for the action of the Society this morning.

Professor HUDSON. Mr. President, I should like to have the privilege of seconding the nomination of President Adatci as an honorary member of this Society.

Mr. Adatci is very widely known for his services in the field of diplomatic relations during the course of the last 25 years; but I would suggest that he deserves to be better known as an outstanding jurist who, during the course of many years, has contributed to our literature on international law, and who has proved himself on many occasions, especially during the last ten years, a very wise and a very efficient guide to the conduct of the most difficult negotiations where legal questions were involved.

Mr. Adatci was a member of the Japanese delegation at the Peace Conference in Paris in 1919 and at that time I had the privilege of sitting beside him every day for six months, and I saw something of his extraordinary ability in action. There were many occasions when unanimity did not exist among the members of the various committees of which he was a member, when Mr. Adatci was asked to preside over the effort to smooth out those difficulties. He was for several years a representative of Japan on the Council of the League of Nations, and in that capacity he was often called upon by the Council to conduct negotiations with reference to international disputes that came before the Council. I recall especially his services in connection with the handling of the dispute between Hungary and Rumania over a period of several years.

It seems to me that this Society would do honor to itself to elect President Adatci an honorary member of this Society; and it is a great satisfaction to all of his friends that he should have been so recently made president of the Permanent Court of International Justice.

The PRESIDENT. Is there any further discussion, gentlemen? If not, before putting the question, I should like to suggest, if it were the rule to "third" a nomination, that I should be very happy indeed to confess my faith in Mr. Adatci and express my appreciation of his services by so doing.

(The question was put on the election of Mr. Adatci as an honorary member of the Society for the year 1931, and he was unanimously elected.)

REPORT OF COMMITTEE ON NOMINATIONS

The PRESIDENT. The next matter upon the agenda is the report of the Committee on Nominations.

Hon. HENRY W. TEMPLE. Mr. President, the committee has held,

really, three meetings, and unanimously, all the members being present except one, reports the following nominations:

Honorary President: ELIHU ROOT.

President: JAMES BROWN SCOTT.

Honorary Vice Presidents: CHARLES HENRY BUTLER, FREDERIC R. COUDERT, JOHN W. DAVIS, JAMES W. GARNER, CHARLES NOBLE GREGORY, CHARLES EVANS HUGHES, FRANK B. KELLOGG, JOHN BASSETT MOORE, JACKSON H. RALSTON, HENRY L. STIMSON, GEORGE GRAFTON WILSON, GEORGE W. WICKERSHAM.

Vice Presidents: CHANDLER P. ANDERSON, DAVID JAYNE HILL, JESSE S. REEVES.

Executive Council to serve until 1934: EDWIN M. BORCHARD, KENNETH W. COLEGROVE, EDWIN D. DICKINSON, HOWARD T. KINGSBURY, PITMAN B. POTTER, WILLIAM J. PRICE, ELBERT D. THOMAS, HERBERT F. WRIGHT.

President SCOTT. Gentlemen, I shall ask the Secretary to take charge of the immediate proceeding.

Secretary FINCH (presiding). Gentlemen, you have heard the report of the Committee on Nominations. Are there any other nominations to be made beside these?

Mr. GUY W. DAVIS. I move that the nominations be closed.

(The motion was seconded and agreed to.)

Secretary FINCH (presiding). Gentlemen, you have before you the report of the Committee on Nominations. What are your wishes with respect to it?

Mr. DENYS P. MYERS. I move that the Secretary be instructed to cast one ballot for the nominees as reported by the committee.

Mr. HOLLIS R. BAILEY. I second the motion.

(The question being put, the motion was carried.)

Secretary FINCH (presiding). The Secretary has cast the ballot; and the gentlemen recommended by the Committee on Nominations have been duly elected to the offices for which they have been recommended and voted upon by the Society.

(President SCOTT resumed the Chair, amid applause.)

President SCOTT. Ladies and gentlemen: On behalf of the members of the Society—I am sure I speak in their behalf—I wish to express appreciation of the action taken in re-electing Mr. Root as the Honorary President of the Society. He was its first president. For seventeen long years he remained its president; and when, because of other and pressing engagements and especially because he felt that the time had come for the Society to be turned over to its younger members, he resigned, he was still willing to confess his faith in the organization by remaining as its honorary president.

I have no doubt that the other gentlemen whose names appear on the list of the elect would wish me to express their sense of appreciation and personal obligation for the honor which you have done them.

As regards the honor which you have done me, I am deeply appreciative. I have always considered myself as a servant of the Society. I consider myself as still its servant, but its servant in any capacity for which they should care to use me. I am deeply grateful, deeply appreciative, and hope that the 25 years which are beginning, which have begun so auspiciously, will be looked back upon in the times to come as confirming the foundation of the Society on a secure basis of law and justice, the purpose of the Society being to foster the study of international law and to promote international relations on the basis of law and justice.

The next item on the program, I take it, would be the continuation of the discussion.

MISCELLANEOUS BUSINESS

Secretary FINCH. Mr. Chairman, before we proceed with the unfinished business, I would like, under the heading of miscellaneous business, to offer a resolution.

Yesterday afternoon the members of the Society were accorded a very delightful diversion from the highly laborious tasks in which they have been engaged, by the Minister of Hungary at the Legation. All the members of the Society and their wives were invited, and some 150 or 200 took advantage of the invitation and put in their appearance.

I should like to propose that the Society adopt a resolution expressing its thanks and appreciation to the Minister of Hungary and Countess Széchényi for their recognition of the Society and its work, and for the very delightful entertainment that they afforded us yesterday afternoon.

The PRESIDENT. Mr. Finch, would you mind a slight amendment?—for their continuous interest in the Society—because this is not the first time. It is simply the culmination of a series of luncheons and of receptions which his Excellency the Hungarian Minister and the Countess Széchényi have offered the members of the Society from year to year.

Secretary FINCH. I will accept that as an amendment and move the adoption of the following resolution:

Resolved, That the American Society of International Law, in twenty-fifth annual meeting assembled, at Washington, April 25, 1931, expresses its thanks and appreciation to their Excellencies the Minister of Hungary and Countess Széchényi for their continued interest in the American Society of International Law, so charmingly and delightfully expressed in the reception with which they honored the members of the Society at the Legation on the afternoon of Friday, April 24, 1931.

The PRESIDENT. The resolution is before you.

(The motion was seconded and the resolution unanimously carried.)

Mr. JOHN L. HARVEY. Mr. President, under miscellaneous business I should like to make a statement and a suggestion. I feel it to be more appropriate here than at any other time in this session.

Before making the statement, I should like to say a word or two about the background on which I found the statement. I have been for many years a member of this Society. My interest in it was not professional. None of the cases that I have ever had have been even remotely connected with the subject of international law; but from the time I read *The True Grandeur of Nations*, by Charles Sumner, I have been interested in the work which this Society is doing, because of the fact that it seemed to me altogether clear that work of the kind that this Society is doing must be done, and successfully done, in order to bring about that state of affairs in international matters that would bring to pass the day when it would be practicable to have disputes between nations settled by reason, and not by breaking heads. That state of affairs is one toward which we are undoubtedly progressing.

I was born in Ohio and lived there for 25 years, and since that time as a citizen of Massachusetts, I have been appointed to public office on many occasions and elected on many occasions, never without considerable opposition, and always with success. All that was 20 years ago. That has given me, I think, some breadth of interest in the work of this Society, some opportunities I ought to say, rather, for forming a just opinion about the work that this great organization is doing. I attended its meetings several years of the time when Mr. Root was president—all great meetings. I attended the meetings with regularity when Mr. Hughes was president of the Society and his presidency was very prolific of good work. This is my first meeting under our new president; but, with this background of observation and this great interest in the real work of the Society, I have to say that at no previous meeting have there been papers superior to those presented at this meeting, more practical, more devoted to the work of the Society, more instructive, informing, and more likely to lead, I am sure, ultimately to notable action.

I will go farther than that. I will say that I do not think there has ever been a program quite equal to the program to which we have listened—the agenda, the discussions, the great subjects that have been up. The recognition question is a great question. It was illuminatingly discussed. My sympathy, I am free to say after all the discussion, is still with the policy that the United States so far has seen fit to adopt toward the Soviet régime; but that to my mind is an unimportant question at this time in comparison with the question that was discussed before it,—the question of our present entrance into the support of the great Court of International Justice in which Mr. Root was and is so greatly interested, which Chief Justice Hughes has steadily and powerfully urged and which is most promotive of the great ideas that Sumner uttered in 1845. My statement, then, Mr. President, is that this is the greatest session that I have ever attended in all the many years that I have been attending the meetings of the Society.

My suggestion is that in some way there should be much more publicity

to make informed public opinion, if it is practicable to obtain it, for the particular papers to which I have referred. Professor Hudson's great paper upon the independence of the court ought, it seems to me, to have very wide publicity; and I am going to suggest a way that in a practical sense, at any rate, is entirely possible.

There are Senators who are greatly interested in this subject, and in favor of our entrance into the court. I have written some of the Senators. Several of them are quite non-committal. They give very little indication of what they intend to do when it comes up. Some of them can be persuaded. But there are two men who have pronounced themselves strongly in favor of entrance. One of them, a Republican Senator with whom I have not the honor of personal acquaintance in any way, said that he would do whatever it was possible for him to do. Another, a great "dry" Senator, a Democrat, also said that he would do what it was possible for him to do. There are other Senators who are like-minded; but those two men at any rate, I am inclined to think, would be willing, at the convening of the Senate that is to consider this question, to publish in the *Congressional Record*, the journal of the proceedings of the Senate, a paper of the type to which I have referred. I am sure that either of those men would be willing to make the motion for that sort of thing, would secure its publication, and that would secure a fair amount of publicity and help form public opinion.

Do not deceive yourselves with the notion that the *Congressional Record* is not read. It is not read generally, and people often pass it over, even those to whom it is sent. But there are those who read it; and when I have seen the large number of young people who have been here listening to these papers, I remember that there are a lot of people of that sort in the United States who get access to the *Congressional Record*, and who would read that paper, because they would be especially interested in it. Most important of all, some Senators will read it.

I think this is a practicable suggestion, and I trust that an effort will be made to carry it out. I do not think it advisable, unless the President so desires, to make a motion to that effect; but I should like to see it done.

Then, after that, and long enough after it so that it will be certain not to interfere with the publication of such papers as it may be deemed advisable to have published, such portions of our proceedings as it may be desired to have published—of course not too much, careful selection being made—after that, I think when the time comes when this matter is actually before the Senate and is ready for debate, every Senator should have upon his desk the journal of the proceedings of this session of the American Society of International Law.

I do not know how much attention has been given this sort of method in the past, or whether it is in the minds of our President and his council or not; but I am sure that this is a practicable way of enlarging knowledge on these great themes, and particularly at this time on the question of entrance into

support of the court. I am sure that it is a practicable method, and that it can be accomplished.

I make this suggestion with diffidence, Mr. President, and I make such remarks as I have made concerning myself, I trust, with modesty. I have not intended to use it as an occasion at all to make note of myself, but to show you that behind this suggestion is practical knowledge of legislative affairs, and of the method which is practicable to enlarge knowledge of this great theme.

THE PRESIDENT. I am sure, Mr. Harvey, the members of the Society are deeply interested in the views of appreciation which you have expressed of the labors of the Society, not excluding the present session. Of course, it is not the purpose of the Society to take action on matters of that kind; but I am sure every endeavor will be made to give publicity to the proceedings of any session of the Society which deals with public questions.

PROFESSOR CHARLES E. MARTIN. Mr. President, I should like to raise a question of discretion. Last evening one of the speakers asked that certain unread portions of a Soviet Russian pamphlet be inserted in our proceedings.¹ I wonder about the wisdom of that without someone checking on the authenticity of the article. It seems to me it might be well to leave with the President the discretion of determining whether or not the document submitted is authentic. I think we might lay ourselves open to certain charges of carelessness if that matter is not attended to.

RESUMPTION OF UNFINISHED BUSINESS

THE PRESIDENT. Is it the desire of the members to continue the discussion of miscellaneous business before returning to the papers of last evening? (After a pause):

If there is no further miscellaneous business, the questions before the Society are the two papers of last evening, the first being "The policy of the United States in recognizing new governments during the past twenty-five years," and the second being "The legal position of war and neutrality during the last twenty-five years."

When we adjourned last night the first paper was being discussed; and I understood it was the desire of the members present that the discussion of the program on last evening should be continued by the discussion of the first of the two papers. Is there any member who cares to express opinions upon the paper of the Solicitor for the Department of State on "The Policy of the United States in recognizing new governments during the past twenty-five years"?

PROFESSOR CHARLES G. FENWICK. Mr. President, I should like to open the discussion of this problem of recognition by raising the question whether, in the development of international organization, we have reached a point where recognition might be made by the collective action of all the nations acting together. It is quite clear that many of the controversies that have

¹ *Supra*, p. 176.

arisen with regard to recognition have been due to the fact that one *de jure* government recognizes a new *de facto* government before another does. In the recent history of the recognition policy of the United States we have several times been put in an embarrassing position because Great Britain, for example, has recognized Mexico before we were prepared to do so; so that the failure to act on our part has raised some question in the mind of the *de facto* government of an unfriendly attitude on our part. Quite clearly, if the power of recognition is to be used to prevent ephemeral revolutions in certain of the smaller states of this hemisphere, the action of the whole collective body of the nations in recognizing that government collectively would be far more effective than the isolated action of the United States.

I should like to amend a statement made by one of the speakers last night to the effect that we are not concerned with the domestic policy of a new *de facto* government, and further that the attitude of that government toward international affairs is not within the sphere of the recognition policy of a country. I think it has always been our traditional policy to require from the new government an explicit assurance that it will observe international law. That assurance, I suggest, might be more effectively got by the whole body of nations acting collectively, coöperatively. I open the question up for discussion because I think such action might enable us to use the power of recognition in a way to prevent ephemeral revolutions and to hold a delinquent government up to the standards of international conduct.

Professor CLYDE EAGLETON. Mr. Fenwick has already said what I wanted to say; but I do want to put myself on that side. It seems to me that the institution of recognition has not had the discussion at this meeting, or been given in general the importance or the significance that it ought to have in the life of the community of nations.

Recognition, if it means anything, means admission into the community of nations. It means the reaching of majority. It means the accolade of knighthood, if you want to look at it in that way; or it should mean that. It should mean that the recognizing state trusts the recognized state to be able to play its part in the society of nations. It means that the recognized state is able and willing to play its part in the society of nations. That is the only justification I can see for the use of recognition. If we are going to have it at all, it ought to mean that. Consequently, I have always been rather in favor of the policy which Mr. Hackworth laid down for us last night, at least in so far as there was a requirement that the recognized state should be able and willing to meet its international obligations; and for that reason alone I have been rather opposed to the recognition of Russia, because it does not matter, I think, what form of government they have, or how we like them, or anything else, if they are able to fulfill their part in the community of nations.

The difficulty about this has been, always, that recognition is an individual arbitrary act which produces the most haphazard, scattered results.

It divides up the society of nations into pairs, some pairs of which deal with each other, and some pairs of which do not deal with each other. It would be far better, I think, as Mr. Fenwick suggested, if we could have a collective recognition by the organized society of nations, that is to say, if the society of nations should organize, and establish standards, and pass judgment as a whole as to whether a new government is worthy of admission into that society, and worthy for the members of the society to deal with it.

Perhaps this much criticism might be made of the present situation in regard to Russia. After listening to what was said last night, I have come across this much: It might be said that the individual action of the United States toward Russia has been arbitrary. That is to say, we have asserted that Russia is unwilling or unable to meet her international obligations because she does not admit that we are right in one claim that we make against her. Perhaps it would be better, then, if we would arbitrate it rather than assert that Russia is unfit for membership in the society of nations. I do not know; but that, at any rate, illustrates the point I am making: here are a large number of the society of nations, a large number of nations who do think that Russia is fit for membership. There are others, ourselves included, who do not. You get an uncertain, too confused situation in the society. If we could have one judgment on that matter for the society of nations, then a new government would be treated equally by all.

I think we are coming to that. Admission into the society of nations, I think, means recognition in so far as the members of the League of Nations are concerned. Perhaps we could develop it on to that point for all states. I should like to see something more made of recognition than is at present. It could be a valuable weapon or sanction in the society of nations; but it cannot so long as, like self-help, it is left to the discretion of an individual state as to how the sanction is to be used.

Professor ROBERT R. WILSON. Mr. President, I have been much interested in Mr. Eagleton's suggestion. I wonder if he has a practical plan for having this recognition accomplished. If it must proceed upon the unanimous vote of the members of the society of nations, it seems to me we would not be any better off than we are. If it may proceed upon something less than unanimity, perhaps it might be difficult to secure its acceptance by the principal or at least the larger states of the world.

As to the matter of recognition of the present Government of Russia, I was much interested in the point of view presented by Mr. Dickinson and Mr. Borchard last evening; and I should like to address a question to either or both of these gentlemen, if they will permit. It has to do with the relations which the present Government of Russia has had with the states which have recognized that system in the past thirteen years. It seems to me that there are a great many people who believe that the diplomacy of the Soviet Government proceeds upon the principles commonly attributed to Machiavelli. I wonder whether Mr. Dickinson or Mr. Borchard would say that

the relations which that government has had with other states during the past thirteen years would support the hope that after recognition by the United States the outstanding questions might be settled by any method satisfactory to the United States; and, if not, whether they would still advocate the immediate recognition of the present Government of Russia?

Professor EDWIN M. BORCHARD. Mr. President, so far as I can judge, the relations of Russia with other countries of Europe that have recognized them have been not a bit more difficult than the relations of the French Government during the period from 1791 down to 1801 with the rest of the world. Indeed, if you look at some of the pronouncements of the French Revolution, you will find that they were not a bit more radical or extreme in their denunciation of the existing order of the world than are those of Soviet Russia.

I think one of the first essentials for teaching international law or dealing with international affairs is a certain objectivity, a certain open-mindedness. If you are going to be doctrinaire, and want everybody to conform to your views of life, I think it is best to take some other subject for your life work, because you have not the state of mind which is appropriate to dealing with a world such as we have.

The relations of the rest of the world with Russia have doubtless been difficult; but are we incapable of dealing with a difficult problem? Must we simply say, "Because we are going to have some difficulty with these people, therefore we are going to have nothing at all to do with them?" Why, anybody who has ever been in the legal and economic world realizes that he has to face many difficulties. You go into a conference sometimes, and you do not know how you will come out. You may find difficulty in restraining yourself; but you learn that it is necessary to get along with people who have an entirely different point of view from yourself.

Perhaps I may venture this remark, for which I hope I will be forgiven: Many doctrinaires who say, "The Soviet Government does not meet our views of what is right; therefore we will not have anything to do with them; we will not recognize them" (just like admission to a private club) do not realize that the policy they are adopting is a policy of war. They want to exclude goods from Russia. They want not to do business with Russia. That is a war policy. Those very same people, I have discovered, are often among the most ardent supporters of such presumably peace devices as the League of Nations and the Kellogg Pact.

In my humble opinion, those men have not coördinated their thinking. They do not realize what they are doing. To me, the Russian problem is a practical problem which must be detached from all emotional preconceptions. I do not care for the Russian system any more than most of the men who have denounced it; but I also realize that there are 150,000,000 people there on a territory occupying one-sixth of the globe; that it is necessary, from the point of view of the United States—and that is my main interest, I believe;

at least, it is one of my main interests—to do business with these people, and get the world “back to normalcy.”

What have we accomplished by antagonizing them here in the last few years? We are not the only people in the world who can furnish manufactured goods. They simply take their orders elsewhere. They seem to get along. They have proved that they can get along. We perhaps hoped, and that hope had a justification, that they could not get along without our recognition. Some of the Central American countries cannot; that is true; but the Russians seem to be able to do it. That means that the particular policy pursued since 1918 no longer seems to have any great justification.

What, then, is the object of the continuation of this policy? What positive plan are you promoting, what positive objective are you achieving, by the continuation of this extraordinary policy that we now entertain? It has been my view that we might adopt the advertisement of Pillsbury's flour—“Eventually—Why Not Now?”

(At this point President SCOTT relinquished the Chair to Professor GEORGE GRAFTON WILSON, an Honorary Vice President.)

Professor JESSE S. REEVES. Mr. Chairman, it seems to me that in the discussion of this question, both last night and this morning, it might be well to try to differentiate two quite different considerations. One is, what is the international law with reference to the matter of recognition? The other is the question of policy. I have not found the speakers at all in harmony as to the first; for one speaker, I think, denied that in international law there is a right to recognition. Another speaker expressly affirmed it.

There must be some international law on this subject. I do not think there is any general agreement as to the existence of the right to recognition. In fact, I am inclined to think, although I state this with considerable diffidence, that the preponderance of opinion among the text writers, at least among modern text writers, is that there is no such thing. However, as we well know, there is some international law which would be involved in the question of premature recognition. At any rate, a state is not absolutely free in the matter. There are certain limits.

Obviously, when France recognized the independence of the United States in 1778, that was premature recognition. It amounted to an intervention in the affairs of Great Britain, and it was so interpreted. Or, to jump over more than a century, there were a good many who felt that as a matter of international law the recognition by the United States of Panama was premature; and, perhaps as an indication that it was premature, eventually we paid for that intervention.

Mr. JAMES BROWN SCOTT (from the floor). Mr. Reeves, will you permit me to say that the fact that it was premature depends upon the very simple question of arithmetic. Three days after the revolution had broken out, the Government of the United States recognized the independence of Panama, not as a government but as a state, which is a much more difficult matter.

Professor REEVES. A much more difficult matter; but obviously similar questions would arise, pure matters of international legal right or duty, with reference to what might be called the premature recognition of a government in a state which we had already recognized.

I do not find, however, that there is any international law with reference to the right and duty to recognize. There is a duty with reference to premature recognition, but I fail to find that there is any duty to recognize a government of a state. If you have a concession theory of recognition, which is a very old one, discussed by Mr. Goebel in his book on *The Recognition Policy of the United States*, if you recognize a certain concession theory of sovereignty to be involved in recognition, I can see that you can build up a considerable body of international law from which it might be concluded that there was a distinct right to recognition in international law. Modern practice, however, has completely demolished the whole conception of the concession theory of sovereignty.

There is very little in the matter of right and duty in the matter of the recognition of new governments upon which you could put your finger otherwise than the matter of premature recognition. I do not find that there is any such matter as the international legal aspects of what might be called delayed recognition. In other words, it is a question of policy.

Some have spoken about the wisdom of a collective policy of recognition; and the doctrinaire character of it is sufficiently developed by the question that was immediately put: "Should collective recognition depend upon the unanimous idea of all other states, or a majority, or what?"

I may say that quite at the opposite extreme is the suggestion which I recently heard propounded by a jurist. He expressed the opinion that recognition should be obliterated; there should be no such thing as recognition; and I am told that that suggestion, made in a country to the south of us, met, if not with favorable response, at least with a considerable amount of interest in a number of different countries: "Eliminate the whole thing. Let us have no more such thing as recognition, and that will solve the problem."

As a matter of fact, recognition otherwise than premature is a question of policy, and it is a policy that affects very definitely and primarily the recognizing state. The United States in 1793 adopted a policy of recognition, for what purpose? For the purpose of protecting and advancing the interests of whom or what? The interests of the United States, and none other.

In the very interesting book which Mr. Dennis wrote some years ago on *The Foreign Relations of Soviet Russia*, he devotes sections or chapters with reference to the recognition of Soviet Russia by various states, and he showed very conclusively that every recognition of Soviet Russia was based upon what was conceived to be the best interest of the recognizing state, and not upon any general principles whatever. Now, we may criticize the policy of the United States; we may not have been wise with reference to it, and we are justified in having our views with reference to that matter; we may

disagree violently with the policy of the United States with reference to recognition; but what I object to is the attempt to set up a measuring-rod in terms of international law, when such a measuring-rod really does not exist, for the purpose of testing the policy of the United States.

After all, whether or not the policy of the United States is wise is one thing which we may properly discuss, and about which we may differ; but let us not undertake to measure that policy in terms of international law, for I insist that there is no measure of international law which limits the policy of any country in this matter except on the side of premature recognition. Delayed recognition, I insist, does not involve rights and obligations in international law.

Mr. SCOTT. Mr. Reeves, may I ask you a question? Are you not confusing two matters? One is the recognition of a state, the recognition of a fact. The other is the question of the recognition of a government. How can there be a rule of international law in the matter of premature recognition if you base it solely upon the question of policy?

Professor REEVES. I think that the question of premature recognition of a government would involve the recognizing state not identically as the premature recognition of a new state.

Mr. SCOTT. Those are two different things.

Professor REEVES. But they are two quite different things. They do embrace very many of the same considerations, however. If, for instance, State A should recognize a revolutionary government in State B which had but a very transient existence, and recognized it out of hand; if it recognizes the alleged government which was operating for a while in its own territory, and was not able yet to operate and never became so. That would be, in effect, an intervention. Now, whatever could be shown to be the damages to State B in the long run caused by such premature recognition I think might be available as a case of intervention. I cannot see that the general principles differ very much as to premature recognition of new states and of new governments; that the instances are mostly with reference to the premature recognition of states, I grant you; but I think the problem might be presented with reference to the premature recognition of an alleged new government in a pre-existing state.

Mr. SCOTT. But if you base it upon policy, not upon law, you have no measure. One policy may be this, and another policy may be that.

Professor REEVES. I think there are some limitations with reference to the right of a state to recognize.

Mr. SCOTT. If there are limitations, it is a matter of law.

Professor REEVES. Only, so far as I see, with reference to premature recognition, and nothing more. I want to make myself plain about it—that a state is free to recognize or not, as it likes, but if the recognition is premature it involves a legal right or a legal obligation; but those considerations do not come into the present matter at all.

Professor FENWICK. Will Professor Reeves try to imagine whether there could be such a thing as the premature recognition of the *de facto* government of Spain?

The CHAIRMAN. (Professor GEORGE GRAFTON WILSON, presiding.) May the Chair ask Professor Reeves if he allows interruptions?

Professor REEVES. Certainly, if I am equal to them.

The CHAIRMAN. Will Mr. Fenwick repeat his question?

Professor FENWICK. Will Professor Reeves try to imagine a possible premature recognition of the *de facto* government of Spain? Suppose the United States had recognized the new government one hour after it had taken office: Can you imagine that being premature in point of international law, so as to give rise to an alleged violation of international law?

Professor REEVES. Suppose, on the other hand, that a mere junta was operating.

Mr. SCOTT (from the floor). That is not the question he has asked.

Professor REEVES. I want to present an example of the recognition of an alleged government that is clearly premature. If it has actual control, that is another proposition; but I am setting up a case where there is clearly a premature recognition of something alleged to be a government, a junta that has not really obtained control. A recognition of that as the *de facto* government of a country I should say would be premature, because it is not even *de facto*. That is the line that I meant to suggest.

Professor FENWICK. In other words, Professor Reeves has laid down one item of international law on the recognition of governments, namely, that the government must be *de facto*.

Professor REEVES. That it must at least exist.

Professor FENWICK. Then we have one element of an international law.

Professor REEVES. I admit that, in part.

Professor FENWICK. May I continue the question?

Professor REEVES. Certainly.

Professor FENWICK. I maintain that there is an international law on the recognition of new governments, and that that international law is that when the government is *de facto* and prepared to observe its international obligations, the state of which that government is the representative has the right to demand recognition, and there is an obligation on the part of others to accord it.

Professor REEVES. Mr. President, if that is true, and if Mr. Fenwick can show me chapter and verse on that, I shall be very glad to acquiesce; but I doubt, I am not able to recall, that a state has the right to demand that another state recognize its hitherto unrecognized government. How could it do so? If you can put your finger on an instance of that in the history of international relations, I shall be greatly indebted to you. On the other hand, we do have illustrations where there has been some gesture made looking toward the recognition as existing of something that does not really

exist and function as a government. That is a different matter. That leads toward intervention. I think they are two very different things.

Professor DANIEL C. STANWOOD. May I interrupt a moment?

Professor REEVES. I yield the floor, gladly.

Professor STANWOOD. Mr. Reeves certainly needs no assistance from me, but I would have answered the question Dr. Scott put to him in a slightly different way. There is, of course, embarrassment in assigning definite legal rules governing either delayed recognition or premature recognition. In neither case has the recognizing state any obligation to a new state. Whatever obligations that exist are to the parent state. In the case of delayed recognition, we may run through the whole gamut of requirements laid down in Dana's notes, and yet recognition, remains a matter determined, not by definite rule, but by judgment, often not untinged with policy. In the latter case, that is, regarding unjustifiably early recognition, the obligation of the recognizing state being entirely to the parent state, falls within the category of rules regarding intervention. We, for instance, did not break a rule of recognition in recognizing Panama. We intervened. It was our obligation to the limited States of Colombia not to intervene that we broke. In that sense I quite agree that there seems to be no absolute law governing either premature or delayed recognition.

Dr. SCOTT. May I suggest that in the matter of Panama we created what we affected to recognize.

Professor STANWOOD. Quite right; or, in the words of Mr. Roosevelt, we took Panama.

Dr. SCOTT. No; *we* did not. *He* did.

Professor STANWOOD. I think that was his language.

Dr. SCOTT. He was not generous enough to associate us with the commission of his crime. He assumed the full responsibility. "I took it," he said.

Mr. HENRY W. TEMPLE. Mr. Chairman, I am rather bold, I fear, to attempt to say a word on this subject after so much has been said already, but it seems to me that two or three things have been discussed together that are easily separable. It has been asked whether we are under obligation not to recognize a new government prematurely. If there is any such obligation, it arises out of our relation with the old state which we have already recognized.

In the very recent case of Spain, for example, we were in established diplomatic relations with the royal government. If that government had itself recognized the new republic, if the old government had gone out of existence, there could be nothing premature in our recognition of the republic.

In the case of Panama in 1903, if there was an obligation not to recognize the new state, as we may suppose without arguing the case or admitting it, if there was premature recognition of Panama, it was because of our obligation to Colombia; an obligation, as was said by the gentleman who just pre-

ceded me, not to intervene in the affairs of a friendly nation. So far as there is any law against that, it arises out of our obligation to the old state. There is a different question when a new government arises, claiming to supersede the old government in an existing state without creating a new and additional claimant to membership in the family of nations.

Mr. SCOTT. That is what I was going to ask you to differentiate. There is one rule, as I understand it, for a state as such which creates a new person or recognizes a new person. This is simply a question of a revolution, a rotation in government, which, I understand upon the highest authority, is a matter of policy and not of law, but which has taken on the quality of law in the case of a *de facto* government. But when is a government *de facto*, and when is it not? The whole thing is up in the air.

Mr. TEMPLE. It seems to me that question falls into two parts. If a part of an existing state secedes from the other part, and establishes a new government, we have one question. If a new government proposes to take over the whole state and supersede the old government over the whole area, that is a somewhat different question. The first thing, it seems to me, is to determine the fact; and the second thing is to decide, on our part, what we want to do about it.

Mr. SCOTT. Would it perhaps help in the differentiation if you said, in the case of recognizing a new member of the international community, that that is an external matter, and that the recognition of a government succeeding one already in being is an internal matter? If it be an internal matter, to what extent is an outside state permitted to intervene, even in its own interest, in the internal and domestic questions of a full-blooded member of the international community?

Mr. TEMPLE. Then the question of Russia is somewhat peculiar. There is no doubt that the old government of Russia has gone.

Mr. SCOTT. Many people do not seem to recognize that. I am glad to have the statement.

Mr. TEMPLE. I should like to find it with a microscope. There are those, of course, who, with regard to France, claim the legitimacy of a certain family as the lawful heirs of the throne. It is rather interesting to remember, according to an unpublished but accessible diary of John Hay, that when Mr. Lincoln, Mr. Seward, and the young secretary, Hay, went to call on General McClellan at one time, the officer who was in charge of the headquarters and went to look for General McClellan was referred to by Lincoln, who remarked to Hay that it seemed rather queer for him to be sending the King of France on an errand. The young officer would have been the King of France if everything had gone right for his family two or three generations earlier. There are those who claim that the old French government has not disappeared; but I think the Russian government has as thoroughly disappeared as the royal government of France. Still, the question is whether we want to recognize the Soviet authorities.

If the theory of the original revolutionists following Kerensky, the second revolutionists, is correct, they do not recognize any international boundary lines. The delegates who go from the United States to the Third Internationale claim to be just as much subjects of Russia as if they were living on what we call Russian soil. I have talked with the representatives of the extreme communist party in this country. They claim to be citizens of Russia rather than citizens of the United States. If that country, if that so-called government under the control of the Third Internationale, claims to be the lawful sovereign of a portion of the citizens of the United States, I would not like to set up in Washington city a center from which propaganda of that sort could go out. To me, that is a stronger reason for not recognizing the Soviet authorities than their refusal to recognize their international obligations in the form of debts.

Professor REEVES. May I make one more observation? Mr. Fenwick asked me a question with reference to Soviet Russia. We are faced with this very question in that connection. We do not know, as we do in the case of the Kingdom of the Serbs, Croats and Slovenes, whether or not the U. S. S. R. is the same state that Russia was. The constitution of the U. S. S. R. might seem to deny it; and so far as I am able to find in the literature of the subject, so far as my examination of it goes, we find no clear-cut decision of that question. It may be that the U. S. S. R. is not, as a matter of state succession, the successor or the same state. We do not know whether it is the successor of Russia or whether it is the same state. I am inclined to think that that question, which perhaps may be only one of constitutional theory, does complicate the matter of the recognition of the government, not of Russia, but of the U. S. S. R.; and the constitution of the U. S. S. R. does not contain the name of Russia in it except in the matter of one federated portion of the U. S. S. R. What are we recognizing? What would we recognize—Russia? No; the U. S. S. R. Is that the same state with which we once had diplomatic relations? I think it is very difficult to give a categorical answer to that question.

(Several members addressed the Chair.)

The CHAIRMAN (Professor Wilson). There is a regulation, I believe, that members are not allowed a second opportunity to speak until after the others have had an opportunity. Several have arisen. (After a pause): There is now an opportunity for repeaters.

Professor CHARLES E. MARTIN. Mr. Chairman, the suggestion by Professor Fenwick that there should be some form of collective recognition is very interesting to me. As Professor Reeves pointed out, the difficulties of doing away with the unilateral character of recognition make that very difficult; and our experience at the Niagara conference was not a very happy one. However, I like the general idea. Professor Eagleton has left the room, but I wanted to object to one suggestion he made, that is, to make collective recognition a weapon against the state or government recognized.

This would be the very negation of the *de facto* principle, and it would be simply carrying further the policy we have sometimes followed in Latin America, namely, that of "picking a winner" through the process of recognition, and thus making ourselves very objectionable to our Latin American neighbors. If the act of recognition becomes multilateral, we must be careful not to allow it to become an instrument of oppression against the recognized state. Most members of the Society seem committed to *de factoism* as a test of recognition. We must take care that it continues if a change in the mode of recognition should be made.

Mr. GUY W. DAVIS. Mr. Chairman, I was very much interested in the suggestion of Mr. Stowell last evening when he said that there was a legal right to recognition, and that if it were too long delayed or withheld there followed a right upon the part of the non-recognized state to retaliate. It seems to me that perhaps the question whether the matter is one of law or of policy somewhat coördinates in that explanation. There might not be a legal right to demand recognition; but if, as a matter of policy, it is withheld, then the withholding state ought not to complain if retaliation follows. It seems to me that if retaliation does follow, then recognition is more likely to be withheld, and more retaliation would follow, and recognition be still further withheld.

Mr. CHARLES WARREN. Mr. Chairman, as a practicing lawyer I have been very much interested in this discussion by the professors, especially in view of the statements in the books that one of the sources of international law is the textbooks of writers on international law.

The subject of discussion seems to have been whether this matter is a question of policy or of law. I fancy that certainly in the English common law, a good portion of the law was originally policy, which later received more or less acceptance and agreement, and became law. In international law, my reading of history would certainly lead me to believe that a considerable portion of it started out as policy—what was best—and was then agreed upon and became accepted as law by virtue of actions of governments and writings by distinguished scholars in international law. Therefore it does not seem to me that you professors get very far by discussing whether it is law or policy, because the United States does not seem to be acting as a matter of law, and I do not see that other nations are. But if we wish to have it develop into a matter of law, then it seems to me we ought to consider what is the best policy; and I suppose international law professors and international law writers are primarily interested in advocating and promoting a policy that leads toward peace in the world.

My view is that in this matter of recognition, whether you call it law or policy, we had better get away from factors that lead against peace and that lead toward irritation between nations, and may eventually lead to something more violent than irritation. It is for that reason that as a practical man, and not as a writer or a professor of international law, I feel rather

shocked and rather dismayed at the somewhat dogmatic attitude our State Department has taken on this question of recognition. "Doctrinaire," I think, is the word that some man has used on the floor, but I would use the word "superior." To my mind, it has taken a rather internationally disagreeably superior attitude on this question of recognition; and, as I say, I feel rather shocked and dismayed at that attitude because I feel that it cannot be persisted in permanently as between one nation and another; and while it is persisted in, it seems to me to lead in the absolutely opposite direction from peace. It leads to an irritation between two of the greatest nations of the world; and that is a very unfortunate situation.

Therefore, I think it is quite beside the point to discuss whether the position of the United States is taken as a matter of law or as a matter of policy, because we should be considering, *not* that question, but whether it is a *good* policy.

The CHAIRMAN (Professor Wilson). There is one question that the Society should decide. We have seven minutes before the time for the meeting of the Executive Council. We have not yet touched upon one of the questions, except casually—war and peace—to which we gave attention last evening. Do we wish to continue this discussion for the remaining six and a half minutes, if Dr. Scott's watch is correct? Or do we wish to go to the other question, and give to it some discussion?

Mr. DAVIS. A point of order, Mr. Chairman. May I observe that the meeting of the Executive Council is to be at 12.30 at Mr. Butler's residence? The hour has been changed.

Secretary FINCH. Mr. Chairman, on the point of order, the Council has accepted the invitation of Chairman Charles Henry Butler to meet at his house and to have lunch, and to hold its meeting there; so that I think we have a little more time now than the program originally contemplated.

There is also a statement on the program that provision can be made for another session this afternoon if the members of the Society wish to continue these discussions; so that before we adjourn I think it will be well if the Society will express its view in that regard.

The CHAIRMAN (Professor Wilson). There are several others who wish to speak. That is why I asked this particular question.

Professor MANLEY O. HUDSON. To bring the question to an issue, I move that when we adjourn, we adjourn to reconvene at 2.30 o'clock this afternoon.

Mr. SCOTT. I second the motion.

(The question being put, the motion was carried.)

Secretary FINCH. I did not complete the information I should have imparted, and that is as to the membership of the Council which is to attend this meeting and luncheon.

The Council is composed of the Honorary President, the President, the Honorary Vice Presidents, the three Vice Presidents, and the three classes of

the Executive Council. That includes, for the meeting to be presently held, the gentlemen who were elected and re-elected this morning.

In case some were not present when the election took place, I may run through the list of names.

(Secretary Finch then restated the membership of the officers elected earlier in the day.)

Professor ELLERY C. STOWELL. Mr. Chairman, several points have been raised. They are rather difficult points. I know that the three-minute rule has not been strictly adhered to, but I do not like to start in if I have to confine my remarks to that time. If we can be allowed a little latitude, I should be glad to take up the questions; but they are too complicated to take up in three minutes.

The CHAIRMAN (Professor Wilson). We can go on until half-past twelve; but you may have five minutes under the rule, I believe.

Professor STOWELL. Even that I do not think has been very strictly observed.

The CHAIRMAN. No; I am afraid not.

Professor STOWELL. Several points have been brought up here that are rather difficult to take into account. One is whether there is a right of recognition. Of course that is a question of how you define international law. The test of international law is whether the rules keep the peace. Over the course of years certain rules have been formulated which have been found to keep the peace.

The matter of recognition lies within the province of each government. The government decides whether it will or will not recognize. It is not like an individual, where you can take him before a court and decide whether he has disobeyed a principle of international law. On the question of recognition, after you decide what is the law of the question, it is for each government to apply it. In the application of the law comes in the policy; but before you decide what the law is, you have to decide what the fact is.

In all of those three cases the government has a chance to mix the law with politics. It can mix in politics, that is discretion, in deciding the facts; it can mix in politics in deciding what the law is, because it gives its own interpretation of the law; and then it can say, "Under the circumstances we are in such a situation that we cannot recognize." So politics comes in right along; but that there is a right of recognition I think will come out when you examine international practice. There you find that where a state or a government which is ready for recognition is not recognized, it begins to use some of the approaches to hostilities. It may even go as far as actually to use hostilities. Then it would come into a situation where it had belligerent rights; and we all recognize that belligerency is a condition of international law and involves the application of international law principles.

The great difficulty in understanding recognition has been shown in Westlake. Westlake points out that individuals have a right to live in

association, and to have that association recognized by other nations, subject to certain conditions. It is, therefore, the right of the individuals composing the community which is at stake. That involves the rights of individuals, and that is where the difficulty lies in understanding this problem of recognition. You cannot get at it unless you take those two things into account—the rights of individuals and of the state. Otherwise, you are faced with a situation where you say that a state has a right to be recognized, or you may say that the rights of a state depend on recognition, and then it has certain rights like belligerency before it is recognized. You are in a hopeless mess unless you recognize this situation.

In regard to Mr. Borchard's point about emotional reaction in regard to Russia, he also took the ground that it was war. He thought that it was not recognized that our attitude toward Russia was war. I fully recognize that it is a form of war. It is the new form of war. We are at war with Russia. It is the new form of war that we are going to see a great deal of, because we are going to get more civilized, and not cut one another's throats. It may be true that this brings certain hardships, certain disagreeable results; but we might as well have the war over there with Russia, with its ideals opposed to ours, as to have it right here inside the United States, and have a civil war.

A similar situation comes in regard to neighboring governments. If their methods of reaching power are such that we do not think we can have coöperation with that kind of a government, then it is appropriate to delay recognition. That is a system that we are employing as a great, leading, civilized state to advance civilization. That is in the line of policy. We may go farther, or we may go less far. Secretary Hughes certainly was a jurist in all senses, not in the sense that was used here a few moments ago, in his attitude toward the non-recognition of governments that come in through *coups d'état*. A change has been announced recently in that policy. Still, Mr. Hughes followed that policy about Russia.

Now I should like to say a word about Panama,—the situation as to the recognition of Panama. Most people would recognize that we had perhaps a right, that the situation was sufficiently serious, to make war on Colombia. I cannot see logical or legal impropriety in using lesser means. We had certain obligations toward the policing of the Isthmus, anyway.

Perhaps I may be allowed to tell two instances which I remember. As I was going out of the Harvard Club in New York one time, the gentleman who was with me knew that Colonel Roosevelt was sitting over in the corner, and he said, "Would you not like to meet him?" So we went over and sat down. Colonel Roosevelt had about him a fine group of young men such as he knew how to gather; and in the conversation I heard something about Panama. I said, "Colonel Roosevelt, contrary to what most of my colleagues feel, I think that was one of the best things you ever did." He jumped up and reached across the table and said, "Professor Stowell, I am very glad to hear you say that." He said, "Of course I was perfectly sure of

the moral and ethical side of the matter, and I asked Mr. Root to make the best case he could; I was surprised to see what a fine case he made."

As to this matter of paying Colombia \$25,000,000, I thought that was a slur upon Roosevelt. If we ought to apologize, we ought to have said so; but we did not. I asked one of the former members of Congress, one of the most respected members from Maine—he is no longer in Congress; I should not like to give his name, because he did not authorize me to quote him—why that was done. He said, "I think that was wrong." He said, "Most of my colleagues felt so; but it was the one thing President Harding asked of us. When a President comes in with a big majority, and asks you one thing, it is pretty hard to refuse it"; and I think that a false interpretation has been put upon that action.

Professor HERBERT WRIGHT. Mr. Chairman, I just want to ask one question, if I may, of Mr. Warren. That is, would he be in favor of a policy of recognition of a government of a union of republics, such as we have in the Union of Socialist Soviet Republics of Russia, which union intended to include within its group the nations of all the world, including the United States?

Mr. WARREN. By all means.

The CHAIRMAN (Professor Wilson). Is there any further discussion? Do you wish to proceed to the discussion of the other topic of war and neutrality, or adjourn that until 2.30?

Just as the President had a telephone call in order that he might get on the floor, I wished to raise the very question that he has been raising, which seems to have been somewhat overlooked at times in our discussion—the question of the difference between the recognition of a new state where there had previously been no state, and the simple recognition of a new government within a state that has a continuous existence. Much of our discussion has not recognized clearly that distinction, because the policy in regard to each, if I may be permitted to say so from the chair, seems to me quite different.

Secretary FINCH. If it is in order to recur to a preceding discussion, that relating to the court, I should like to have a very few minutes.

The CHAIRMAN (Professor Wilson). It is entirely proper, as I understand, to discuss any of the papers. We are now back at the World Court.

Secretary FINCH. Yesterday afternoon there was some discussion here as to the intention of the Senate in 1926 in drafting the reservations to American adherence to the Permanent Court of International Justice; and the suggestions of an eminent jurist, who was said to be Judge Moore, were brought into the discussion.¹ At that time I said a few words about it, but I did not have the exact phraseology of the proposal of this eminent jurist; and in fairness to him, and to have the record a little more accurate, I should like to read his exact phraseology now, with the privilege of substitut-

¹See pages 113-119, *supra*.

ing it for the summary I attempted to give of it yesterday afternoon. The draft of the Senate reservation regarding advisory opinions proposed by the "well-known international jurist" reads:

That, in acting upon requests for advisory opinions, the court shall not, under any circumstances, depart from the essential rules guiding its activity as a judicial tribunal but shall give notice and open hearings to all interested parties, and shall in each case freely determine, in the exercise of its own judgment, whether it can, in keeping with its judicial character, properly answer the question put to it, and what shall be the nature and form of its response; that in no case shall the court give any confidential advice but shall announce its opinions publicly, together with the opinions of dissenting judges; that the court shall not give an opinion on a question to which the United States is a party without the consent of the United States; and that the United States disclaims all responsibility for any opinion on any question to the submission of which the United States was not a party.¹

After referring to that text, I made the statement that it was not adopted as Reservation 5, but that Reservation 5 was made considerably more comprehensive in its restriction upon the action of the court. In order to bring that out clearly, I should like to read and incorporate into the record the actual wording of Reservation No. 5, adopted in 1926.

Professor HUDSON. All of us know that. Why do we need to have it read? Let it be incorporated in the record, if you like.

Secretary FINCH. If Mr. Hudson objects to the reading of it, I will refrain from reading it.

Professor HUDSON. I do, indeed. I think that goes back over our discussion of yesterday.

Secretary FINCH. I had previously got the opinion of the Chairman that I was in order.

The CHAIRMAN (Professor Wilson). It seems to me that an official statement of what a person has said, and on which action is based, properly should be in the record, and it should be in that form; and as we are taking up a discussion of this particular topic we should discuss the official record rather than something that was said and perhaps misunderstood yesterday, as we have had a misunderstanding of it. It is not long, in any case.

Secretary FINCH. Reservation 5, as adopted in 1926, reads:

That the court shall not render any advisory opinion except publicly after due notice to all States adhering to the court and to all interested States and after public hearing or opportunity for hearing given to any State concerned; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.²

I wish to read those two texts in juxtaposition, so as to bring out the difference between the memorandum of the "well-known international lawyer" and what the Senate actually did; and in substantiation of what I attempted to bring out yesterday, that I thought the gentlemen who drew the reservations of the Senate knew what they were doing.

¹ Congressional Record, Vol. 67, Pt. 2, p. 2294.

² See official text, *infra*, p. 262.

Now, Mr. Chairman, I wish to make a further suggestion. There have been a number of documents referred to in this discussion without having the texts available. I made a motion yesterday, and it was adopted, asking to include in the record both the English and the French texts of the Protocol of Accession.¹ After getting suggestions from other members of the Society, I should like to enlarge that motion a little by including in the record the official text of the Senate resolution of 1926, the Final Act of the signatories of the court statute adopted later in 1926, and the minutes of the committee of jurists, which in March, 1929, drafted what is known as the Protocol of Accession of the United States. Those minutes are not long, and they could be printed as an appendix to our proceedings.

I am making this request for a very definite reason. It is not a passing one. I believe that the United States eventually is going into the Permanent Court of International Justice. I do not entirely agree with everything that has been said on either side of the question relating to the status of the court as a World Court or as a League Court. My own view is that the Permanent Court of International Justice has a twofold nature. I think that with respect to contentious cases it may properly be called a World Court, and that in respect to such matters the entry of the United States would be entirely unobjectionable and highly desirable. I do not offer any suggestion of argument as to the acceptance by the United States of the jurisdiction of the Permanent Court to render advisory opinions, but I do refer to that as showing its second character.

I think that the Permanent Court of International Justice, in rendering advisory opinions, is a League Court, and that it is this twofold character of the court that has complicated the situation with reference to the adherence of the United States. It would have been more appropriate, in my opinion, had the reservation of the Senate taken a more simple form, had it followed the same phraseology with reference to advisory opinions as it did with reference to the optional clause—namely, that the Senate advise and consent to the adherence of the United States to the protocol of the court, excluding the optional clause, as it did, and excluding the court's jurisdiction to render advisory opinions, leaving the question of advisory opinions to be a purely League matter, as I think it is. The difficulty now is that the Senate has adopted a text which is applicable to League activities, and the League is trying to make itself believe that the Senate has not attempted to do that.

If the United States becomes a member of this court, as I said I thought it would, these questions are likely in the future to come up for practical discussion and consideration. I think it will be most desirable to have the record of these questions under discussion complete in the hands of our members, so that when those questions are referred to in the future our readers will understand that we had a full conception of what we were discussing,

¹ See page 109, *supra*.

and that our proceedings in this meeting may be regarded as a valuable and complete contribution to the subject.

(At this point Mr. CHARLES HENRY BUTLER announced that the invitation to luncheon at his home, 1535 I Street, included the outgoing class of councillors and the members of the Editorial Board, as well as the incoming class.)

Secretary FINCH. May I ask for action upon the suggestion I made about the inclusion of these documents?

Professor HUDSON. Mr. Chairman, I think the suggestion does not go far enough, or goes too far. Mr. Finch proposes to print some documents without printing the complete documents. What he has proposed is not complete at all. If you want to have anything printed on the subject, I suggest you would have to print all the proceedings of the conference of 1926. You would have to print also not only the proceedings of the Committee of Jurists of 1929 but the proceedings of the Conference of Signatories of 1929; and that would be a very large volume indeed.

These documents are all available; and I do not see any purpose in having them in the proceedings of this Society, and putting our Society to this additional expense. If we want to prepare anything on the subject, we ought to prepare a complete *dossier* and print that; but anything short of a complete *dossier*, it seems to me, would be useless.

Secretary FINCH. Mr. Chairman, I do not think Professor Hudson has correctly interpreted what I have in mind, which is to include in the records of this meeting the documents which are the subject of our discussion, so that when we are reading this discussion we can get a correct idea of what the members taking part in the discussion had in mind.

Professor HUDSON. All of these documents have recently been published in a government document. Anybody interested in this subject must have the documents. They are published in a dozen places now. I do not see any reason for our going to this expense.

Dr. DAVID JAYNE HILL. Mr. Chairman, I move that the proposal of the Secretary be authorized.

(The motion was seconded.)

Miss HOPE K. THOMPSON. I will ask that the Final Act have annexed to it the draft protocol of 1926.

Secretary FINCH. I have no objection to adding that.

Professor HUDSON. If Mr. Finch wants to publish anything, I should be very pleased to see a *dossier* published; but it has to be a complete one. What he has suggested is not complete at all. It would be very bad for us to publish the minutes of the Committee of Jurists of 1929 without publishing the minutes of the Conference of Signatories of 1929. The Conference of Signatories was an authoritative body, and the Committee of Jurists was not.

Mr. LESTER H. WOOLSEY. I would suggest to add to that the Conference of Signatories of 1929, at least. That seems to be authoritative, as Mr. Hudson says. It is very short.

Secretary FINCH. The subject under consideration here is the protocol of 1929 relating to the adherence of the United States to the court and the minutes relating to that protocol. That is why I proposed to print them in our record. I have no objection to putting in the record the minutes of the Conference of Signatories of 1929 on the same subject.

The CHAIRMAN (Professor Wilson). Is there any further discussion? If not, the question is on the motion as made.

(On a division, the motion was carried by a vote of 22 to 4.)

The CHAIRMAN. The vote is 22 to 4. Therefore the documents will be printed.

The time has arrived for the Executive Council to go to the home of Chairman Butler of the Council, for a meeting of the Council and for luncheon. We will therefore stand adjourned until half-past two in this room.

(Thereupon, at one o'clock p. m., an adjournment was taken until 2.30 o'clock p. m.)

SIXTH SESSION

Saturday, April 25, 1931, 2.30 o'clock p. m.

The afternoon session was called to order at 2.30 o'clock p. m., in the Willard Room of the Willard Hotel, President James Brown Scott presiding.

The PRESIDENT. Ladies and gentlemen: The session this afternoon is for the continuation of the discussion of the papers read at last night's session and discussed this morning, but not completed. I take it that if there is a desire to continue the discussion of other matters relating to papers presented at previous sessions, there will be no objection.

THE LEGAL POSITION OF WAR AND NEUTRALITY DURING THE LAST TWENTY-FIVE YEARS

Professor ELLERY C. STOWELL. I should hesitate to speak again so soon if anybody else would step up; but there are a few things that I should like to say about the paper on the laws of war and neutrality.

In the first place, I was quoted about the laws of war; and it seems to me that there are two great questions about the legality of a war that is undertaken. First, "Is the purpose of the war legitimate?" I will come to that in a minute. The second is, "Was the war begun in a legitimate manner?"

The second question—"Was the war begun in a legitimate manner?"—relates to the steps of the procedure, the declaration, the delay, etc. That is a matter of general interest, that all the states should insist that any recourse to force, irrespective of the motive, irrespective of the purpose alleged, should be begun in this regular way; and I think from that point of view the jural use of force, the use of force in the legitimate manner, is of great importance and of great international concern. This, I believe, has always been part of international law; but sometimes we observe international law without knowing it.

In the paper on the recognition of states, the author, the reader of the paper, referred to the former practice of legitimacy of the king—that governments should rest upon legitimacy. I was reading Voltaire's *Louis le Grand*; I cannot just remember where, but he points out that in the epoch of Louis XIV, at the time when they all recognized the principle of legitimacy—that they should have a government based upon a legitimate principle—there were in refuge at Venice and elsewhere a large number of perfectly legitimate kings who found it impossible to recover their possessions, and that was because the states were observing the *de facto* principle, although they claimed to be following the other principle.

In international relations the states have been observing this rule about watching carefully any violations of the procedure in regard to recourse to force. At the same time, as far as I know, that has never had very much attention paid to it by writers or been adequately formulated. The principle

requires that there be a declaration, that there be an opportunity; before you have the declaration of course you must have the complaint, the failure of redress. I will not go into all those details, but I think that is the first point.

Now the second—the legitimacy of the purpose for which the war is engaged: A purpose is almost always alleged. Very generally the true purpose is not given, the underneath purpose, but a purpose that has a general legal significance is alleged, and that tribute paid to this legal principle across the years indicates the force that it has. We are coming back more and more to this idea of Grotius, that legitimate war can be engaged in only in defense of a legitimate principle, and any other war calls for a combination of the other states to put it down.

Now, of course, if they agree not to have recourse to war, and to employ other measures, then recourse to force is a violation of the procedure, and on that ground alone the states should combine against it. But I do wish to say that this interpretation of legitimacy of a war that was made by Mr. Martin—I wish he were here to take up the defense of his view—is the point that I wished to discuss.

President SCOTT. As we are meeting here in an extraordinary session, I wonder if we could speak with a certain degree of informality, and if it would be permissible for me to express an opinion with greater freedom than if the meeting were more formal.

What Dr. Stowell has said is a matter of very, very great and increasing importance. For several centuries, under the influence of the Roman civilians, a war was legitimate or just which was declared in accordance with the law of Rome. The justness of the war depended upon the compliance of its declaration with certain sacramental forms. Whether the war in itself had a just cause, not merely was declared in accordance with formal rites, did not seem to merit any particular attention.

The result seems to be that any war which was declared in accordance with custom or the terms of law was a just war. This misconception did not appeal with any great force to the theologians and the doctors of the church; and the result was that there was worked out a theory of just war which our friend Dr. Stowell has attributed to Grotius. I think he means that it is to be found in Grotius, rather than that Grotius was, in any sense of the word, the author of the doctrine. The theory of Grotius was that there could be as many just wars as there were wars to redress the violation of a right, to redress wrongs, and he came to that opinion because he had in his mind the doctrine of a right being preserved and a wrong redressed by judicial means within a state.

If you go back as far as St. Augustine—Presbyterian that I am, I have somewhat fingered these matters—you will find that the justification of war is made to depend upon the fact that there has been a violation of a right, such a violation as to give rise to a proceeding in the court of the prince

(that is, within the state), if such a court existed in which redress might be sought. Therefore, in the absence of a court between equal states, or between states, a court which could not be imposed by a prince, the writers went on the theory that although war was a redress by force, it was in the nature of an execution of a judgment, and that the judgment, in the absence of a court, would arise in a somewhat different way. The ruler of the country, usually referred to as the prince, would consult with his counselors. He would be advised that there was a just cause of war, a just cause for a suit to be brought, a violation of a right, a commission of a wrong, and that the controversy was, therefore, of a legal nature. If damage had been suffered in property, then there could be damages awarded in a law suit. If the wrong in question was in the nature of a criminal act, then there might be punishment. Victoria lays down the rule in very strong terms, that the prince should summon his counselors, that the question should be debated from the different points of view as if a thesis were presented and the counselors, under the chairmanship of the prince, were acting as both lawyers and court, that he (the prince), upon the advice of his counselors, should enter a judgment, and, with the force at his disposal, seek redress of the foreign state, if, having been duly informed of the proceedings, it should not be inclined to yield to the judgment.

It is a theory upon which, if I may say so, our whole peace movement is based. It was framed originally for the justification of war between Christian peoples. It has been in large measure the reason for the creation of an international tribunal; and now that that international tribunal exists, which we may consider today as the court of the prince, there is no reason for resort to war for the settlement of wrongs which could be the basis of a civil or a criminal suit in a court of justice; and Grotius, in what he says, is following precedent, the precedent of the theologians from St. Augustine down through St. Thomas Aquinas.

I hope you will not consider this as too pedantic or too technical. It is advanced merely in order to strengthen the argument which you have made, that after spending centuries on the mere question of a declaration or of a formal notification of war, we are brushing that aside, and are looking at the substantive thing to see whether or not, in the measured judgment of mankind and of our common humanity, there shall be a resort to arms when there is in being a tribunal before which a nation may appear to plead its cause, and before which the defendant nation can be summoned to justify its action. We are living today, fortunately, in the presence not merely of a court of the prince, but of an international tribunal representing the conscience of mankind, and the states, forming but isolated portions, are soon, I hope, to be united in a sense of oneness of our common humanity.

Professor CHARLES G. FENWICK. I take it the Chairman is actually condemning Professor Stowell, while seeming to approve.

President SCOTT. Oh, no!—not at all.

Professor STOWELL. I do not so take it.

President SCOTT. I was giving him 1,300 years of precedent for his view.

Professor FENWICK. I find it impossible to see any justification for Professor Stowell's suggestion that at the present day, 1931, there is such a thing as a legitimate war or a legitimate object.

President SCOTT. I was not referring to that. I was referring to the distinction he made. He said one thing was the declaration of war, and the other thing at the present day was insistence upon justice. My proposition was that we are opening up the whole matter, and finding a thing just or not, and that the reason for a resort to arms was ceasing because there was the court of the prince. That is my proposition.

Professor GEORGE GRAFTON WILSON. May I ask Mr. Fenwick simply one question? I simply wish him to define "legitimate" in the sense in which he is using it. I am a little doubtful.

Professor FENWICK. I was using the word that Professor Stowell used; and I understood Professor Stowell to make a distinction between the legal declaration of war and the object for which the war was fought, and to suggest, in connection with the latter, that there was still, in 1931, such a thing as a war for a legitimate object.

President SCOTT. My understanding of Mr. Stowell—he can best express his view, but I do it in order to justify my intervention—was that if you brush aside the mere superficial question as to whether or not the war is properly declared in accordance with a certain procedure, and look at the substance of the thing, we have to come to the conclusion whether the redress sought is of a legal nature which, according to the practice of the centuries and enlightened opinion, would be a legal ground for the presentation of the case to a court, if it existed, as the only justification for war which was given for centuries; and that if there is a tribunal to which it could be presented, then due process of law should stamp, if I may use that expression, upon war, and crush it out of existence. That is my view.

Professor FENWICK. Does Dr. Scott recognize as a hard matter of law that there is an obligation today under all circumstances to refer a case to an international court before going to war?

President SCOTT. I shall answer your question on one condition, that you will allow me to express my opinion, without requiring me to state whether it is a rule or not.

Professor FENWICK. That is the point of interest to lawyers, is it not?

President SCOTT. Oh, no; not at all. If you want my opinion, you can have it. I believe that a resort to war in the present day, when there is, in my opinion—I am speaking only for myself—adequate machinery for peaceable settlement, when there is an international document to which the signatures of 58 states are appended by delegates, plenipotentiaries acting under instructions from their respective governments, pledging their countries to

settle their disputes by peaceful means—I believe that a resort to arms at the present day, instead of submitting the matter to peaceful procedure, beginning it may be with good offices, and running through the entire gamut, culminating in a legal process,—I believe that war, if it exists, is a remnant of barbarity which is inconsistent with civilization, and that in a civilized community it should not exist, and if it exists it should not be tolerated. That is my view.

Professor STOWELL. That is exactly my view, also.

Professor FENWICK. I subscribe to that; but I go on to observe that it is entirely out of date to make any references to Grotius and the preposterous doctrine of a just war—a just war in the judgment of the countries fighting it, with each country the judge in its own case, and each country taking the law into its own hands. That is out of date; and for Professor Stowell in this year to refer to wars for a legitimate object, when each nation is the judge of its own claim and each nation the judge whether its object is legitimate, is to use words that are meaningless. Let us eliminate the idea of law from the object of war, and admit that it is still lawful to go to war in so far as the nations have not explicitly abandoned their traditional right; but there should be no such thing as justifying your war as being for a legal object when you are the judge in your own case.

President SCOTT. I think I shall have to ask Mr. Stowell to reply to that.

Professor STOWELL. It seems to me that when we went into the war with Germany it was a just war, and under similar circumstances I think it would be a just war again.

Professor FENWICK. You are speaking not as a lawyer, but as a moralist?

Professor STOWELL. No. When the war is engaged in, both sides, Germany and the United States, call it just; and the decision as to whether it is or is not just has to depend, as in the case of other interpretations of international law, upon the preponderating opinion of the civilized states.

Professor GEORGE GRAFTON WILSON. Mr. Chairman, the discussion along this line is one in which, from the point of view of international law, I have very little interest, because it seems to me to have no relation whatever to international law. It may have to international politics or international morality, if there be such a thing. We not being a party to any such court of international morality as has been mentioned, our case is not going before any such court. Our case relating to war is going to the Supreme Court of the United States. That court admits that there is a state of war, and we have to admit that that state exists when war is declared in accordance with the provisions of our Constitution.

As international lawyers, if we are going to change the situation, we shall have to change it from another point of view than international morality. Personally, I should like very much to hear the discussion on the legal aspects of it, because nobody has any question as to the barbarity of

war. So far as I know, no one has any very grave question as to the stupidity of a very large part of the wars that are carried on, but as to the legality of the war, that is a question that can be determined fairly easily; and I took it that that was a part of what Mr. Stowell was talking about when he said, if it is begun in accordance with the legal provisions under which war may be undertaken, then the courts have very definitely decided as to whether the war is conducted in accordance with certain legally accepted principles.

There you get into something that, as international lawyers, we may consider. As to the morality, as to the abstract justice, I presume very few will agree in regard to the last war, even; and as to who started it, the books have not stopped yet; and one of the most important ones is still in the process of construction. We would think we might find out by this time who started the war, and then we would have to look up and see whether he really had a just cause in starting the war.

I suggest merely that we get back to the legal aspects of war; or, if we wish to talk about the other thing, well and good. It is interesting, and we shall have a choice variety of opinions upon it; but they will not be legal.

Secretary FINCH. Mr. Chairman, I suggest the possibility that the characterization of war, or the declaration of war, as a matter of policy, or as a matter of morality, or as a matter of law, may be affected by an action which all the nations of the world a few years ago took when they signed the Pact of Paris renouncing war as an instrument of national policy. I do not wish to bring up a general discussion of that pact, or the legal position of war as a result of that pact; we discussed that last year. But it seems to me we ought to take cognizance of the fact that such a pact is in existence, and that practically all the nations of the world have now said that they will not resort to war as an instrument of national policy; so that at least some of us who regard that pact not entirely as a "scrap of paper," may maintain that we should not discuss war any longer as a matter of policy, and that nations are obliged to consider the settlement of their international disputes by peaceful means, which I take it means orderly and legal means, as a result of their signatures to that pact.

Professor CLYDE EAGLETON. Mr. President, I am very much interested in the subject from the angle Mr. Wilson suggested. Last year I spent some time trying to define "aggression," and I came to the conclusion that it cannot be done. I also came to the conclusion that we could not define "war." That is the thing that puzzles me most right now. I do not know what war is.

President SCOTT. Sherman gave a definition.

Professor EAGLETON. In that investigation I went to Grotius. I went even back of Grotius, following our President's investigations, and I came to the conclusion that he was right; but what he says does not fit present-day situations. I should like to suggest that what we have to do now is to change our terminology. It may sound radical if I say that what we need

to do is to declare that all war is illegal, just or unjust, defensive or aggressive; but that goes back to the question of what is war?

I take it that war as a concept is based upon the theory of sovereign states with no superior at all, each state being able to use war in self-defense, and in furtherance of its own rights or desires or ambitions. If we organize a society of nations, then you have a different situation. A war used by the organized society of nations as a sanction I think we ought not to call a war. It is a different thing from the right of individual states to use force against each other for their own purposes.

This, of course, is all in the future. Now, in spite of the Kellogg Pact, I am afraid there is such a thing as war, even if it is hard to define. But if we are going to build for the future, it seems to me we have got to abolish all war, because you cannot tell what is a just and what is an unjust war, what is an aggressive or a defensive war, beforehand. The thing to do is to prevent the use of force by individual states, to deprive them of their right to use force for their own purposes, and to reserve to the organized community of nations the right to use force as a sanction in protection of law and right.

Mr. AMRY VANDENBOSCH. Mr. Chairman, it seems to me we can cut down the legality of war in two ways: One by setting up a procedural process which must be exhausted before war becomes legal, and secondly by setting up certain substantive grounds as illegal bases for war. Any attempt to declare war illegal on substantive grounds is futile; it might as well be abandoned. But a large number of procedural barriers can be set up against war, and in this way its legality cut down.

We have much the same difficulty, in the Constitution, in the "due process" clause. When the Supreme Court declares a law unconstitutional on the ground of violation of due process, there is no question about it when the law is declared defective on the procedural side. The moment the Supreme Court declares a law unconstitutional because it violates the substantive grounds of due process, everybody is at variance as to the correctness of the decision.

Mr. DENYS P. MYERS. Mr. Chairman, I have given this matter some thought, and have tried to arrive at as definite a statement as possible in my own mind. I have not the papers with me, but perhaps I can say something of it from memory.

We have a number of international agreements at the present time which affect the right of a state to go to war. Those agreements are the Covenant of the League of Nations, the Paris Pact, the Statute of the Permanent Court, the Optional Clause of the Court, and of course you could go on and bring in the compromisory clauses in multilateral conventions. You also have in force at the present time almost exactly 400 bilateral pacific-settlement treaties of an "all-in" character.

I tried to analyze all of that material with relation to the possibilities of somebody getting into a war without too much treaty violation. I found

that there are only eleven states in the world today that can enter a war without violating one or the other of those documents—Afghanistan, Argentina, Brazil, Costa Rica, Ecuador, Egypt, Iceland, Mexico, Soviet Union, Turkey and the United States. There are some seven states that would have to violate two in order to get into a war—Bolivia, Dominican Republic, Guatemala, Honduras, Nicaragua, Paraguay and Peru.

I carried the investigation a little further in connection with bilateral treaties. It is rather obvious that Switzerland and Uruguay are not likely to get into a war. They may have very serious differences, but they have probably got to take it out in making faces at each other, diplomatically or otherwise. So I took the states of the world and the map of the world and set down states which were tangent to each other, on the assumption that it was neighbors that were most likely to be in a position to get into a war with each other; and after having acquired those data I analyzed them in connection with the bilateral treaties. I counted up. There are 250 tangencies between states on the map of the world today; and of those tangencies I found only 100 that were not definitely affected by an "all-in" bilateral pacific settlement treaty.

With that physical picture in mind, the possibility of getting into a war without violating a treaty—which is one test, at least, of legitimacy—brings you to examine the character of those multilateral engagements.

The Paris Pact, I suppose, is about as difficult to give a legal significance to as some of the legal phrases in our own national life, such as "due process of law" or "public welfare." The pact means something, and it means something legal. Exactly what it means, it is very difficult to say; but one thing is certain: If a state does not positively violate the treaty, it is at least in the wrong if it seeks to settle its disputes by other than pacific means. The burden of proof is on it so far as the Paris Pact is concerned.

With respect to the Covenant of the League of Nations, Article 12 definitely provides that a state, before acquiring the covenantal right of resorting to war, shall submit its case to some form of pacific settlement, and wait a certain time. That does not answer the whole story, but still it sets up considerable of a hurdle. For instance, you have got to have a pretty good *casus belli* that will withstand going through a third-party jurisdiction for a considerable time, and end up with sufficient heat back of it to precipitate a war. The Statute of the Court, of course, creates no positive jurisdiction of itself. In connection with other things, it undoubtedly does; and particularly the Optional Clause creates a compulsory jurisdiction which puts all parties to it under the necessity of being haled into court by the other party.

Professor FENWICK. Oh, no!

Mr. MYERS. Oh, yes!

Professor FENWICK. Only in four cases. There are a lot of other cases—political disputes, and so forth.

Mr. MYERS. You mean the reservations vitiate the completeness of that statement?

Professor FENWICK. All you have to do is to say the dispute is not legal, and you go to it and fight.

Mr. MYERS. No; you cannot quite do that, because the other state has the right to interpret your reservations as it pleases, and to hale you into court. The court may find that it has no reason to bring you there; but the other state has, within the bounds of your reservations, a complete right to initiate a case against you. What is going to eventuate in that case is another thing.

It seems to me that those considerations considerably affect the possibilities of war today. Of course they do not go the whole distance; but it seems to me more important than what the legal situation is at present, that you have in such developments a general thesis, a general tendency of international jurisprudence, if you will. Call it a habit that is developing. It is of considerable significance in this connection.

Mr. E. G. TRIMBLE. Mr. Chairman, I am interested in this question of war and peace; and as I listened to Professor Fenwick and Professor Stowell I became a little confused, because, it seemed to me, they were confusing law and morals. Professor Wilson, therefore, made part of my speech when he said what he did.

To clarify things, I should like to ask if this is Professor Fenwick's position—does he consider that a war may be legally legitimate but never morally legitimate? That is, is it Professor Fenwick's position that a nation may go to war legally for anything it chooses, but would he say that it was not morally justified in resorting to that method of settling disputes?

Professor FENWICK. I should say that under the present conditions of international law, the United States has a legal right to go to war in certain cases, but that that legality arises not from the alleged object of the war, as being a just object, and the justness determined by ourselves in our own case, but that that legality arises because thus far the United States has accepted no comprehensive obligation not to go to war.

Now, perfectly clearly, I regard this as a very backward situation, and I am very far from justifying it morally. When I say that the United States has a legal right to go to war I do not wish to give my moral approval to it—very far from it. But we are international lawyers, and we are interested in knowing the extent of legal obligations, in order that with a higher morality ahead of the law we may go on and bring the law into accord with our moral ideals.

Mr. TRIMBLE. I drew the inference, perhaps I was unjustified, from what you said to Professor Stowell that you would not look upon war, generally, as being morally justifiable; but you did not quite commit yourself definitely on that.

Professor FENWICK. I say that there is no such a thing as a legal war

judged by its object, because the moment a nation is judge in its own case we are confronted with the preposterous situation which was Grotius's mistake, as well as the mistake, I fear, of Professor Stowell, that a state can consider its war as legal because of a legitimate object as determined by its own judgment. That, I rule out entirely.

Mr. TRIMBLE. Thank you. I think I understand your position.

Now I should like to ask if it is not Professor Stowell's position that a war may be both morally and legally justifiable because of the object for which a nation is fighting?

Professor STOWELL. Certainly. I think that it may be both morally and legally justifiable. I think our war with Germany was both morally and legally justifiable; but I can also understand that Germany considered that her war was also morally and legally justifiable. Then how are we to determine the matter? Each state determines for itself sovereignly in the first instance. The appeal is to the consensus of the majority of states. That consensus was overwhelmingly against Germany, and registered for all time that Germany was a violator of international law.

She violated international law both by the purpose of her war, which was unjustifiable from the international point of view and in morals, and she also violated it from a procedural point of view, because instead of allowing time for the exercise of the usual method of settling international differences in Europe by conference, she cut that procedure short. She said she was not going to have a second Algeciras, and in that way she violated the procedural requirement. It was easy for everybody to see that she violated the procedural requirement in that matter, and violated her treaty in going through Belgium. Those two things were clear; and the world should have intervened, or states should have intervened, on that ground. But on these other minor questions, more remote, they will have to wait for the judgment of others.

Mr. TRIMBLE. Mr. President, if I may have just a minute more before I go on to my next question—I wanted to ask one more question of another gentleman—I desire to say that I cannot agree with Professor Stowell at all in saying that the object for which Germany fought made her war illegal, nor the procedure by which she began the war. She did begin with a declaration, I believe, before she invaded Belgium. Now, she may have violated law after she declared war. I do not doubt that she did. I believe that she did violate law after she got into war; but, so far as I can see, both sides did that.

Professor STOWELL. We are speaking about legality in two senses. While the war is being conducted, it is a use of force which has to be treated as legal. The laws of war apply to it just the same whether the ultimate purpose, or the purpose for which it was undertaken, is a legal purpose or not. The two are not always distinguished.

Mr. TRIMBLE. But a nation can violate law in carrying on war.

Professor STOWELL. Yes.

Mr. TRIMBLE. The invasion of Belgium was a violation of a treaty.

Professor STOWELL. That is a part of the procedural violation.

Mr. TRIMBLE. I was very much interested to hear Professor Eagleton admit that he had given up the hope of finding any formula for determining when a nation is the aggressor, because I agree with him that that is impossible. He also admitted that in spite of the Kellogg Pact we still have war in, I presume, the traditional sense.

Now I should like to ask Professor Eagleton what he thinks the position of a nation should be—the position of the United States, if you want to make it concrete—if war developed in Europe today. Should we remain neutral? Since we cannot determine who the aggressor is, is not a neutral position the only possible and intelligent position to take? Will he answer that question?

Professor EAGLETON. No; I do not think we ought to stay neutral.

Mr. TRIMBLE. But you said we could not tell who the aggressor was.

Professor EAGLETON. No, but the whole situation is "balled up." Of course this is all in the future.

Mr. TRIMBLE. Well, let us—

Professor EAGLETON. Do you want to talk in the present?

Mr. TRIMBLE. Yes. That is the reason why I asked the question. We agree on the future all right.

Professor EAGLETON. Very well. Then I should say that in the present anarchic situation, in which each state can judge for itself the right or the wrong of the cause, the United States also ought to assume her responsibility in determining the right or wrong of the cause, even if it is an insufficient judgment, and take sides for what she thinks is the right. I should like to see her go to the extent of engaging herself on the right side. I think that she ought not to stay neutral, but at least she should refuse to supply arms to the side that she thinks is in the wrong. I am still for the Capper resolution.

Mr. TRIMBLE. So far as I am concerned, I am in sympathy with what Mr. Eagleton says about our government refusing to supply arms; but it seems to me to be a tremendously serious thing for us to take sides if he admits that we cannot determine who the aggressor is, because it certainly is a serious thing for us to jump into a European war and help one side when we cannot be sure who deserves help. We are far less certain now about who was primarily responsible for the World War than we were in 1914; and I think there is no doubt that we will be equally uncertain in future wars. I do not suppose anybody will attempt to say that because Japan fired the first gun in the Russo-Japanese War, Japan was the aggressor. I think everybody admits that Russia had a share of responsibility. Now, if we cannot determine who the aggressor is, it seems to me the only sensible and moral thing for us to do is to stand aside, because otherwise we may be helping the wrong party.

Professor FENWICK. May I ask Mr. Trimble a question? Would he

be prepared to accept the principle that today the aggressor is the nation which resorts to war without first arbitrating its case, and that the decision as to who is the aggressor should be taken by the existing organization of the League of Nations, and that if the League finds that one of the parties has gone to war without being willing to arbitrate or conciliate or have recourse to the various agencies now accepted, that nation would be the aggressor, and that the United States, instead of remaining neutral, in the sense of insisting upon the old rights of neutrality, would acquiesce in such action as might be taken by the League to bring the outlaw to terms?

Mr. TRIMBLE. Mr. President, Professor Fenwick asks so many questions in that question that I am not sure I kept it all in my mind.

As far as I understand the meaning of these treaties, covenants, etc., the large nations have not yet agreed to submit all disputes to arbitration and to abide by the result. If they had, then, I might consider that nation the aggressor who refused to arbitrate.

As far as I am concerned, I am not willing to consider any nation the aggressor that will not submit to arbitration and agree to accept the decision; because no major Power has agreed to that now; and until they do I am not in favor of calling that nation the aggressor. Furthermore, I would not be willing, either, to say that I would always accept the decision of the League of Nations as to who the aggressor is, not at all, because, frankly, I doubt the probability of the members of the League of Nations always deciding scientifically or objectively in a case involving certain nations; for example, Soviet Russia.

As to what the position of the United States should be in the case of a war in Europe, I cannot decide that now. I would not attempt to decide it in advance. As long as I am in doubt, and I think I would be in doubt in most cases, as long as I am in doubt as to who is the aggressor, I am in favor of the United States staying at home and attending to their own business. I say that because the older I grow, and the more I think, the more hesitant I become to pass judgment upon my fellow man. I think all modern wars are the result of a conflict of interest; and I think it is usually impossible to point out accurately one nation and say, "That is the aggressor." War arises from a conflict of interest; and any judgment that I may pass, or that the United States Government may pass, will just mean that we are imposing our own standards.

There is no absolute standard by which to judge morals. I believe we used to think so, and I believe the tendency that we display yet to assume there is, results in that almost universal tendency of human beings to oversimplify complex problems. In the complex world in which we live today I think it is utterly impossible to determine, certainly at the time, what nation is the aggressor.

Professor FENWICK. Will Professor Trimble apply those principles to disputes between man and man?

Mr. TRIMBLE. Mr. President, I do not want to take the rest of the time here; but I do not think we can draw an analogy too closely between individuals within one state and groups of people acting as nations.

President SCOTT. May I intervene just for a moment, not at all to take part in the discussion, but to supply you with authority? President Cleveland thought that that could be done, and said so in his message to Congress on the 18th day of December, 1893.

Mr. TRIMBLE. I respect President Cleveland's opinion, but I would not accept that as deciding the question finally at all.

Professor DANIEL C. STANWOOD. I think you drew the analogy yourself between the rights of men and the rights of states.

Mr. TRIMBLE. I said "my fellow man"; but I was referring to groups of people in Europe. I do not object to applying that part of my reasoning to individuals at home. And, as far as I am concerned, I think our government has gone too far in allowing our domestic agencies to intervene in private affairs.

Professor EAGLETON. Mr. Chairman, I just wanted to say that if I said a moment ago that the United States ought to decide who is the aggressor, I did not say what I had in mind. What I said, or meant to say, was that the United States should decide who has the right cause. That may be the aggressor. It may be the defender. That makes no difference to me. Who has the right cause? And, in the present situation of the United States, I suppose that could only be decided on a moral basis.

Mr. TRIMBLE. It seems to me that is just the difficulty—of determining who the aggressor is.

Professor EAGLETON. But I am not determining that. I do not care about it.

Mr. TRIMBLE. Is it not the same thing? It is the same problem.

Professor EAGLETON. No; not at all.

Professor GEORGE GRAFTON WILSON. Who are the United States?

Professor EAGLETON. That is one of my problems.

Professor STOWELL. Mr. Chairman, it seems to me that every state is obligated to settle its international differences either by arbitration or international conciliation. I think that obligation existed before the last war, and I think it has been incorporated in treaties since which have codified existing obligations. It is sometimes easy to determine who is the aggressor. A state that fails to observe the obligation to arbitrate or refer a difference to international conciliation is an aggressor state; and in such a case there can be no justifiable neutrality. Westlake, I think, sets down the cases in which neutrality is justifiable: When the justice of the cause is in doubt; when the result of intervention in the struggle would be only to widen the area of conflict; or when the state in question could intervene only at a cost to itself which would be out of reason. Otherwise, he did not recognize the right to remain neutral; and I do not, either. I think we ought to participate in

every other case. This matter of aggression is the central question to be considered.

Mr. Chairman, we have here a very distinguished professor from the *Ecole des Sciences Politiques* in Paris. I should like to ask the Chair if he will not invite Professor Gidel to express an opinion on this important question.

President SCOTT. I was waiting until there might be a pause in the discussion in order to move toward my beloved friend, Mr. Gidel; and, for fear that this inwardness on my part should not assume external form, Mr. Fenwick came to suggest the same thing in my ear.

Professor STOWELL. May I just say that when I was in Paris two years ago I had the great pleasure of being present at one of Professor Gidel's lectures, and it was a most lucid and most delightful lecture.

President SCOTT. I think however much we may differ as to aggression and as to just causes, we are unanimous on one point, namely, that we would not be rising to the opportunity of the occasion, and we would be guilty of a breach of international courtesy, if we did not insist that Mr. Gidel come to the platform and take part in this discussion, or leave with us some expression of his opinion on some phase related to this, or even more general observations if he has them in his heart.

Professor Gidel, it is the unanimous request that you give us the pleasure of hearing your voice here.

(Professor GIDEL responded in French and presented some observations upon various aspects of the question under discussion.)

Mr. AMRY VANDENBOSCH. Mr. Chairman, I should like to say a few words about recognition, if I may.

The PRESIDENT. The desire is expressed to continue the discussion of recognition. In the absence of any objection you are recognized, sir.

Mr. VANDENBOSCH. With respect to *de facto* recognition, if "*de facto*" means anything, it implies recognition of the existence of certain facts; and yet as one of the factors in *de facto* recognition there is always mentioned the willingness or ability of a state to fulfil its international obligations. The moment that factor is accepted, factualism, it seems to me, is abandoned. Even Russia has not declared itself unwilling to fulfil its international obligations in every respect. There are just certain respects in which it is unwilling to do so. Even with respect to this question of the debts, as I understand, Russia contends that the Russian state in existence now is a new state, and is not the old Russian state; and if its claim is correct, the new government has no obligation to pay the old debts. That, at least, is a question that might be discussed diplomatically, or even be left to arbitration.

Then there is one other matter I should like to mention, and that is the suggestion this morning of collective recognition. That seems to me one of the worst I have ever heard of. It is elevating or reducing recognition to

a League of Nations sanction, if I may use that term. Now before the application of any sanction, peaceful methods, such as conciliation through diplomatic discussion and conference, ought first to be exhausted. Here a sanction would be applied before any such thing could be invoked.

The PRESIDENT. Is there a desire to continue the discussion?

Professor HERBERT WRIGHT. Mr. Chairman, yesterday I addressed a question to Professor Hudson concerning the Council Resolution of May 17, 1922.¹ I did not have the text with me at that time; but I should like to have the text incorporated with my remarks, if I may.

The PRESIDENT. There will be no objection.

(The resolution reads as follows:)

**RESOLUTION ADOPTED BY THE COUNCIL OF THE LEAGUE OF NATIONS, GENEVA, MAY 17, 1922,
ON THE ADMISSION TO THE PERMANENT COURT OF INTERNATIONAL JUSTICE OF STATES
NOT MEMBERS OF THE LEAGUE NOR MENTIONED IN THE ANNEX TO THE COVENANT**

The Council of the League of Nations,

In virtue of the powers conferred upon it by Article 35, paragraph 2, of the Statute of the Permanent Court of International Justice, and subject to the provisions of that article,

Resolves:

(1) that the Permanent Court of International Justice shall be open to a State which is not a Member of the League of Nations nor mentioned in the Annex to the Covenant of the League, upon the following condition, namely: that such State shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the Covenant of the League of Nations and with the terms and subject to the conditions of the Statute and Rules of Procedure of the Court, and undertakes to carry out in full good faith the decision or decisions of the Court and not to resort to war against a State complying therewith.

(2) that such declaration may be either particular or general.

A particular declaration is one accepting the jurisdiction of the Court in respect only of a particular dispute or disputes which have already arisen.

A general declaration is one accepting the jurisdiction generally in respect of all disputes, or of a particular class or classes of disputes which have already arisen or which may arise in the future.

A State, in making such a general declaration, may accept the jurisdiction of the Court as compulsory *ipso facto* and without special convention in conformity with Article 36 of the Statute of the Court; but such acceptance may not, without special convention, be relied upon *vis-à-vis* Members of the League of Nations or States mentioned in the Annex to the Covenant which have signed or may hereafter sign the "optional clause" provided for by the additional protocol of December 16th, 1920.

(3) The original declarations made under the terms of this resolution shall be kept in the custody of the Registrar of the Court. Certified true copies thereof shall be transmitted, in accordance with the practice of the Court, to all Members of the League of Nations and States mentioned in the Annex to the Covenant, and to such other States as the Court may determine, and to the Secretary-General of the League of Nations.

(4) The Council of the League of Nations reserves the right to rescind or amend this resolution by a resolution which shall be communicated to the Court; and on receipt of such communication by the Registrar of the Court, and to the extent determined by the new resolution, existing declarations shall cease to be effective except in regard to disputes which are already before the Court.

¹ See *supra*, p. 110.

(5) All questions as to the validity or the effect of a declaration made under the terms of this resolution shall be decided by the Court.²

Professor HERBERT WRIGHT. Professor Hudson explained to me afterward that he thought the resolution was poorly worded.

The PRESIDENT. Is there any further observation? (After a pause): If there be none, it is my duty, as the presiding officer, with the expression of appreciation on the part of the members of the Society at the presence of so many at the session, and of my own pleasure, to express the opinion that in the 25 years of the Society's activities I have myself never been present at a more helpful and a more fruitful and a more promising discussion than that of the past three days.

With these observations, I declare the meeting of the American Society of International Law of 1931 closed.

(Whereupon, the meeting adjourned at 4:20 o'clock p. m.)

² League of Nations Official Journal, June, 1922, p. 545.

ANNUAL DINNER

Saturday, April 25, 1931, 7.30 p. m.

The 25th annual dinner of the Society was held in the Willard Room of the Willard Hotel, Washington, D. C., at the above date and hour, President James Brown Scott presiding.

The guests of honor were Señor Don Manuel C. Téllez, Mexican Ambassador, Dean of the Diplomatic Corps; Chief Justice Charles Evans Hughes, Supreme Court of the United States; the Honorable Henry L. Stimson, Secretary of State; and the Honorable Henry W. Temple, Chairman of the Committee on Foreign Affairs, House of Representatives.

MEMBERS AND GUESTS

Carroll S. Alden	Señor Don Diez de Medina, <i>Minister of Bolivia</i> , and Madame Diez de Medina
Eleanor Wyllys Allen	L. Dostert
Señor Dr. Don Pedro Manuel Arcaya, <i>Venezuelan Minister</i> , and Madame Arcaya	A. H. Feller
Mr. L. Astrom, <i>Minister of Finland</i>	Mr. Tytus Filipowicz, <i>Polish Ambassador</i> , and Madame Filipowicz
Mr. H. V. Bachke, <i>Minister of Norway</i> , and Madame Bachke	Eleanor Finch
Mikas Bagdonas	Mr. and Mrs. George A. Finch
Mr. and Mrs. Hollis R. Bailey	Arthur Flemming
A. H. Baldwin	Richard W. Flournoy, Jr.
Mr. B. K. Balutis, <i>Minister of Lithuania</i>	Pauline A. Frederick
Laura M. Berrien	Mr. and Mrs. Frank Fritts
Donald C. Blaisdell	Captain and Mrs. A. F. Gilmore
George H. Bakeslee	Judge and Mrs. Samuel J. Graham
Eugene F. Bogan	Clara Greacen
S. W. Boggs	Charles Noble Gregory
Mary Bossidy	Earl C. Hackworth
Ira H. Brainerd	Mr. and Mrs. Green H. Hackworth
Percy E. Budlong	Countess Margaret Hadik
Fanny Bunand-Sevastos	Mr. and Mrs. Thomas H. Healy
Charles Henry Butler	Mr. and Mrs. W. E. Hilbert
Mr. and Mrs. Wilbur J. Carr	David Jayne Hill
Randolph Fitzhugh Carroll	Stanley K. Hornbeck
L. C. Cassidy	Mr. and Mrs. Manley O. Hudson
Wade H. Cooper	Chief Justice and Mrs. Charles Evans Hughes
Señor Don Dávila, <i>Chilean Ambassador</i> , and Señora Dávila	Mr. and Mrs. Bert L. Hunt
Guy W. Davis	Mr. and Mrs. Alan T. Hurd
Francis Déak	Rear Admiral and Mrs. C. L. Hussey

- Mr. and Mrs. Charles Cheney Hyde
 Aly Ismail Bey, *Chargé d'Affaires of Egypt*, and Madame Aly Ismail Bey
 Amy H. Jones
 O. D. Jones
 Mr. and Mrs. Thorsten Kalijarvi
 Mrs. Austin Kautz
 Robert F. Kelley
 Mr. and Mrs. O. C. Kiep
 Mary Emily King
 Emma Lansing
 Frederic P. Lee
 K. C. Leebrick
 Mrs. F. C. Letts
 Sir Ronald Lindsay, *British Ambassador*
 Mr. and Mrs. Johann G. Lohmann
 Mr. Eric H. Louw, *South African Minister*
 Mr. Michael MacWhite, *Minister of the Irish Free State*
 Señor Dr. Don Manuel E. Malbran, *Argentine Ambassador*, and Madame Malbran
 John W. Maloney
 Charles E. Martin
 Rev. Dr. Albert J. McCartney
 Mr. and Mrs. H. B. McCawley
 Mrs. D. W. H. McClarren
 Mr. and Mrs. A. P. Mills
 Mr. and Mrs. Felix Morley
 Mr. and Mrs. Roland S. Morris
 Mr. Ahmet Muhtar, *Turkish Ambassador*
 Denys P. Myers
 Rev. Dr. W. Coleman Nevils
 Amos J. Peaslee
 Señor Dr. Don Perdomo, *Chargé d'Affaires of Honduras*, and Madame Perdomo
 Dr. Leonide Pitamic, *Yugoslav Minister*
 W. J. Price
 Herr Friedrich von Prittwitz und Gaffron, *German Ambassador*
 Mr. and Mrs. Jackson H. Ralston
 Señor Dr. Don Adrian Recinos, *Minister of Guatemala*, and Madame Recinos
 Joseph Redlich
 Albert Redpath
 Miss Reynolds
 Admiral William L. Rodgers
 Grace Roper
 Mr. and Mrs. A. N. Sack
 Otto Schoenrich
 Mr. and Mrs. James Brown Scott
 Andrew D. Sharpe
 Donald D. Shepard
 Mr. Charalambos Simopoulos, *Minister of Greece*, and Madame Simopoulos
 Mr. and Mrs. C. V. Smith
 Stanley P. Smith
 Dorothy Somerville
 Ruth E. Stanton
 Mr. and Mrs. D. C. Stanwood
 Doris Stevens
 Henry L. Stimson
 Mr. and Mrs. Ellery C. Stowell
 Chester T. Su
 Henry G. Sweney
 Count Széchényi, *Minister of Hungary*, and Countess Széchényi
 Countess Cornelia Széchényi
 T. A. Taracouzio
 Señor Don Manuel C. Téllez, *Mexican Ambassador*, and Madame Téllez
 Henry W. Temple
 Hope Keachie Thompson
 Colonel and Mrs. Thorp
 A. M. Tillman
 William R. Vallance
 Mr. J. H. Van Royen, *Minister of The Netherlands*
 Amry Vandenbosch

Dr. J. Varela, <i>Minister of Uruguay</i> , and Madame Varela	Marjorie Whiteman
Mr. Ferdinand Veverka, <i>Czechoslovak Minister</i> , and Madame Veverka	James R. Wick
Señor Dr. Don Homero Viteri Lafrente, <i>Minister of Ecuador</i>	David L. Wickens
Hamilton Vreeland, Jr.	William E. Willis
Mr. and Mrs. Charles Warren	George Grafton Wilson
Miss Watson	Paul Wilstach
Warren F. Wattles	Quincy Wright
Mr. and Mrs. Mangum Weeks	Mr. Chao-Chu Wu, <i>Chinese Minister</i> , and Madame Wu
George T. Weitzel	Señor Don Pablo M. Ynsfran, <i>Chargé d'Affaires of Paraguay</i> , and Mrs. Ynsfran
	J. Edwin Young

INVOCATION

Rev. Dr. ALBERT J. MCCARTNEY, Pastor of the Church of the Covenant, delivered the following invocation:

Almighty God, our Father, Thou Who hast made of one all kingdoms and tongues and peoples for to dwell together upon the face of the earth: We come to Thee in the spirit of fraternity, and pray that Thy grace may be in our hearts, in our homes, and in all our lands.

God bless America and the kindred nations. Bless Thy servant, the President of this country, and all those in authority in other countries. May Thy kingdom come and Thy will be done on the earth. Amen.

(At the suggestion of the President of the Society, a toast was drunk to the President of the United States.)

AFTER DINNER SPEECHES

INTRODUCTORY ADDRESS BY THE PRESIDENT

The TOASTMASTER (President Scott). Ladies and gentlemen: We celebrate this evening the 25th anniversary of the birthday of the American Society of International Law. We are likewise present at the 25th of the annual dinners which we have enjoyed during the period of 25 years.

The Society was formed on the 12th day of January, 1906, in the building of the Bar Association of the City of New York. Unfortunately, Mr. Burlingham, President of the Association, who had hoped to attend and to extend, as it were, greetings from the cradle, is unable to be present, owing to a sudden illness—not what is sometimes called a diplomatic indisposition, but one which is certified to by a doctor's word in his behalf.

At the dinner held on the 20th of April in the year 1906, Mr. Elihu Root, then Secretary of State and the first President of the Society lending this prestige and his name during a period of 17 eventful years, presided in person. According to a note of the day, a clipping from a newspaper which

I hold in my hand, informs us that with the Secretary of State, president of the new organization, were the British Ambassador, then Mr. James Bryce, later to be Viscount Bryce; Richard Olney, formerly Secretary of State; and General Horace Porter, among the speakers. The dinner bringing the convention to a close took place in the red parlor of the New Willard, the room in which we are having the pleasure to dine together tonight.

Secretary Root presided, with Ambassador Bryce on his right, and Secretary Straus, of the Department of Commerce and Labor, on the left side. Others at the speakers' table were Mr. Buchanan, Assistant Secretary Bacon, Justice Harlan, Secretary Garfield, Commissioner Macfarland of the District of Columbia, Postmaster General Meyer, Chief Justice Stanton J. Peelle of the Court of Claims, General Horace Porter, Admiral Stanton, Rear Admiral Sperry, and Dr. Woodward. Joseph H. Choate, former Ambassador to England, who was to have been one of the speakers, was unable to attend, so the legend runs, having been called to New York during the afternoon.

A few days ago I received a letter from the first President of the Society. It was read at the opening session; but as a number are here tonight who could not honor us with their presence on that occasion, I feel it proper to open the ceremonies of the occasion by reading the letter again:

(The Toastmaster here read the letter of Mr. Elihu Root, already reproduced in the proceedings of the opening session, p. 1, *supra*.)

This, ladies and gentlemen, is the message of Mr. Root, the first President, who, though absent in person, is with us in heart and in spirit.

The second President is here, and will speak *in propria persona*. Ladies and gentlemen, I have the honor to introduce the Chief Justice of the United States.

REMARKS OF CHIEF JUSTICE HUGHES

I am glad to give you a word of greeting on this anniversary, and to reweave the charm of the delightful intimacy of other days. It is a privilege again to breathe the pure and serene air of this Society; to come once more to a scene of peaceful controversy where nothing is to be decided. You have the rare joy of employing your best efforts in relation to affairs of much practical importance without any responsibility for results. Mr. Justice Holmes once observed of the Supreme Court—"We are very quiet there, but it is the quiet of a storm center." You, in contrast, view the storms at a safe distance, maintaining a sort of legal meteorological bureau. You may recall Dr. Lieber's letter to Secretary Seward at the close of the Civil War, suggesting the reference of international disputes to universities. "The law faculty of a renowned university would seem," he said, "almost made for this high function." That was said before the organization of this Society, with its even superior facilities for supplying not only weighty judgments but the choicest dissenting opinions.

I congratulate you upon having survived 25 years of the contemplation of international law, with unquenchable zeal. Your enterprise was launched by that distinguished statesman whose sagacious practicality is always the ready instrument of a noble idealism. Mr. Root in his opening address gave the *raison d'être* of your organization in these words: "It is impossible that the human mind should be addressed to questions better worth its noblest efforts, offering a greater opportunity for usefulness in the exercise of its powers, or more full of historical and contemporary interest, than in the field of international rights and duties." The past 25 years have been extraordinarily adapted to your purposes. You have been the witnesses of the most astounding, epoch-making, revolutionary events in modern history. Not merely a change in the setting of the stage, or in the introduction of new actors, not simply in new forms, or in the mere vicissitudes of national fortunes. There has been a breaking of the crust which centuries have formed, and forces have been released which are creating a new world. The processes of readjustment are so radical that we are as yet unable to discern the outcome. But one thing we know. Human nature, with all its limitations and its aspirations, remains essentially the same, and its supreme interest is justice. And the great interrogation as we face the uncertainties of the future is—Which will be triumphant, lust of power, an imperious chauvinism, class consciousness, or a dominating sense of justice which rides in the whirlwind and directs the storm? The sentiment of justice, like charity, begins at home. When we seek the ultimate controlling force, we look not for pious phrases but for the spirit of the nations as disclosed not simply in international relations but in domestic affairs. Turbulent peoples will not build enduring peace. As there can be no reign of law in the international sphere save as it expresses the sway of an enlightened conscience, recognizing what is fairly due to others as well as to oneself, there is small ground for encouragement if we find in the domestic sphere, where this attitude of mind is to be formed, the absence of self-restraint, the inability satisfactorily to maintain the administration of local justice, and the victories of the passionate, the unintelligent and the corrupt.

If we consider the content of international law, as a body of rules which states feel themselves under obligation to observe, we may be disappointed in both the extent and the rate of development. We have had recently a vivid illustration of the difficulty in extending formally the content of international law or even of recording agreement as to what that content now is. In this hemisphere, to be sure, a notable effort in codification has been made. But the endeavor of years which brought about the recent conference at The Hague on codification served to disclose that even with respect to three selected subjects, Nationality, Territorial Waters and Responsibility of States, subjects deemed to be ripe for the purpose, no agreement could be reached at present. There is nothing surprising in that. We should have been astounded beyond measure if an agreement had been reached. The

most difficult of all tasks for lawyers is to agree upon what the law is. They are quite ready to furnish some very general formulas from which endless controversies may spring in application. The difficulty increases with the importance of the subject. The art of circumlocution, so familiar in domestic procedure, is not wholly unknown to international conferences. You may remember the advice of the old lawyer to his son: If justice seems to be against you insist strenuously upon the law. If you are in doubt about the law, demand justice. If you have a case where both law and justice are against you, "talk around it." Quite naturally the effort to make real advances in defining or expanding the content of international law is more apt to reveal disagreement than harmony of views. And when you add to the capacity of lawyers—and perhaps the even greater capacity of jurists—for multiplying differences of opinion, the divergence in national policies, the apprehensions of nations, and the historic conflicts in the views of foreign offices, you have a task for which a period of 25 years is altogether too short to yield gratifying results.

Instead of attempting to record the progress of international law, I should prefer to dwell upon the progress of international lawyers. Perhaps, I should say, the progress of the students of international law. They multiply, and increase in learning and avidity. Not so long ago, except upon the part of very few, there was but a polite and weak interest in the study of international law. Now it is one of the most popular of subjects. Conferences and institutes are formed to give opportunity for professional talent and ample encouragement to amateurs. All the devices of modern communication are enlisted to excite and to gratify the interest of the public. Books and periodicals dealing with various aspects of foreign relations fill our library tables, courses offered in universities are eagerly sought, and special schools are established for intensive study. Groups of young persons under skilled leaders may be found journeying about the world, attending assemblies and seeking interviews with harassed foreign ministers and conference delegates. All this activity holds the greatest promise. It will yield results in lawyers, if not in law. And I believe that out of this earnest study and comparison of opinions, and, in particular, out of the serious endeavor to understand intimately and correctly the conditions to be dealt with, the bases of national policies and the grounds of national fears, we may look for the gradual development of that enlightened conscience in international affairs from which the concepts of the international law of the future will proceed.

If little has been achieved in promoting the development of international law, as a definite body of law, we have abundant reason for gratification in the promotion of institutions for the peaceful settlement of international disputes. Law is not an end in itself but a means for establishing a basis for the mutually advantageous intercourse of peaceful peoples. If success were attained in laying down a complete code of law, there would

still be the need of endless applications to varieties of conduct. We have abundance of law in this country, but that is only the beginning of trouble. Courts are busy in determining countless shades of differences in application. Under the most carefully contrived pieces of legislation, it is the unexpected that happens. Our excellent Constitution, after half a century of interpretation, and despite agreement upon fundamental principles, gives us every day new questions. And under our abundant federal legislation, with its host of specific provisions, controversies constantly arise. Happily our domestic peace does not depend upon the attainment of an impossible ideal in the certainty of law, but rather upon the assurance of the peaceful settlement of controversies by our system of judicial determinations. In the international sphere, while we should do all we can to define and improve the law, it is idle to talk either of peace or of justice save as the instrumentalities of peaceful settlement are promoted. Suppose, at the outset in our own country, the opinion had been dominant that it was useless to have a federal judicial tribunal, which should deal with the scope of federal regulation of interstate commerce, until interstate commerce, its instrumentalities, and the extent of permissible federal legislation had been fully defined. What a mess we should have been in! The purpose of the constitutional provision could be achieved only through gradual interpretation by judicial tribunals. In my present official position, it is not fitting that I should comment on the special questions of policy that are under consideration by our Government. But, apart from these, I have no hesitation in saying that the best hope of the world today, so far as the development of international law is concerned, lies in the establishment of a permanent court of international justice. I grant you that its province is not to legislate, that it should have a body of law, as complete as possible, to apply. But the accepted principles which govern the nations must be expounded and applied. A vast and steadily increasing number of international agreements give rise to questions of interpretation, which are questions of law requiring judicial determination. Beyond these, there lies the broad field of conciliation and adjustment of disputes which may not be of a justiciable sort. It is in the development of agencies for these purposes, giving greater play to the processes of reason, and in the disposition to utilize them, that we find the most notable progress.

The labors of jurists are not lost because they fail to end in agreement among themselves. Even in their disagreements they are the exponents of the essential methods of reason. They not only supply the necessary material of learning and argument, but they inculcate the spirit which demands reasoned results. It is that spirit that counts in the development of law.

It is that spirit which broods over this organization and has made it a valued instrument in the formation of sound opinion. This Society has not been long established, but it could ask for no worthier traditions than those it enjoys or for a more enviable record of usefulness than that which we review on this anniversary.

The TOASTMASTER. I am sure you would wish me to express your appreciation of the presence of the Chief Justice on this occasion and of the remarkable, and indeed outstanding, address with which he has honored us this evening.

It would be unpardonable in a toastmaster to take issue with a speaker of the evening, and, if it were permissible, it would be not only discourteous but also an act of temerity on the part of anyone who should venture to differ from a Chief Justice of the United States. It was the great Dr. Johnson, I think, who said that it was not for him to bandy epithets with his sovereign. We dare not allow ourselves to think of the fate in store for one who should indulge in an exchange of views with the present and distinguished Chief Justice of the United States. However, it occurs to me that he would not object to a word or two on codification, in which he, as well as all of us, is deeply interested but about whose future he seems to be more doubtful than the sanguine among us.

He referred in passing to a recent conference at The Hague, which struggled with three subjects, and was felled by at least two of them. My interest in codification and its success is my only justification for a word in its behalf.

If a conference has met which did codify international law, and produced specimens in sufficient number and of a model form to convince the public of the possibility of meeting in conference and reaching satisfactory agreements, then the future of codification clearly is settled; for it is demonstrated that it could be done, and what has been done can be done again in the future.

Allow me to recall to the Chief Justice that a conference met at The Hague in 1907, and adjourned with 13 conventions to its credit, a conference composed of the delegates of 44 nations of the world. It therefore can be done again in the future; and if it was not done a year ago, the fault perhaps is with the personnel and more with the manner of preparation than with the subject, because what has been done can be done, and it will be done, for it must be done; because without a law, known in advance, which the Permanent Court of International Justice, that greatest of international instrumentalities, is to administer, it is doubtful if the nations of the world will have complete or adequate confidence in judicial settlement. The future of judicial decision depends, in my opinion, upon the codification of the law of nations. I should like to add but a word, as I must draw these remarks to a close by a word and present the next speaker, who, I am sure, is anxious to address you, and is only waiting for the opportunity, as to the preparation for an international conference.

There is such a thing as overpreparation. There is such a thing as sending out questionnaires; there is such a thing as obtaining formal statements as to the law on each of the subjects in question from each of the prospective conferees; there has been such a thing—on my part a great indiscretion I believe it to be—as the publication of these questionnaires and of these

reports, so that when the delegates proceeded to The Hague the substance of their instructions was known in advance, and instead of being able to negotiate and to reach agreement, they were there at The Hague to register the views of their governments already expressed in advance and set forth in the replies to the questionnaire. It was very much like a cash-register conference.

I hope, with all the force of my being, whatever that may be, that another conference will meet in the near future at The Hague to undertake again the codification of international law, and that the delegates meeting there in conference shall be sent as negotiators and not as mere registers, because the essential element of conference is conciliation, and the breath and the life of conciliation is a deep respect for the opinions of others, which cannot be if the views to be presented are known in advance, and if the nations cannot change their opinions, because nations, even more than individuals, indulge in this face-saving operation.

At the first banquet of the American Society of International Law, on the right-hand side of the presiding officer sat Mr. Bryce, Ambassador of Great Britain, at that time representing as well Canada. On the present occasion the representative of our neighbor to the south honors us with his presence. Ladies and gentlemen, I have the very great pleasure and the honor of presenting to you His Excellency the Mexican Ambassador, and the Dean of the Diplomatic Corps accredited to these United States. Mr. Ambassador.

REMARKS OF THE MEXICAN AMBASSADOR

Achievements in progress, no matter how noble they are, no matter how costly and high we may think them to be, in no way imply a curtailment of individual or collective responsibilities and efforts. Progress is endless; and to observing minds those achievements only bring about more clearly the realization of our failings, and a better comprehension of the necessity of a broader and more earnest coöperation of all for the attainment of our common endeavor.

In the business of government we have reached democracy, which we believe still to be our highest attainment in that sphere of human undertaking. Through democracy we are governed by agencies and laws of our common free choice, in the election and in the dictation of which we are all entitled to participate, and to express our frank opinion on equal footing. Through democracy, within the limitations of individual capability, every one may have an equal opportunity of service, an equal opportunity to participate in the direction of affairs that may affect his own betterment and the common welfare of his people, because the formula of the great human political idealist has been unaltered and unsurpassed; because democracy is still intended to be "the government of the people, by the people and for the people"; and because, if democracy is so, it can fail only when the people fail in the compliance with their duties and in the acceptance

of their responsibilities, which are the only foundation for the rightful promotion of individual prosperity and common well-being.

But as the individual cannot prosper and be happy in a distressed community, or the community in a distressed nation, no state can at present lock with impunity its prosperity and happiness from a distressed world within barriers of selfish isolation. Human intelligence, human pride and human ambition had the power to make the earth shrink so much that its ever-straining surface—where the Song of Songs of peaceful contentment need be sung no more—seems to have become a patrimonial territory of a common flock afflicted with a common uneasiness, with a common aspiration and with a common desire for the common good, which it is up to human intelligence, human pride and human ambition to satisfy.

Sincere efforts in that direction have not been lacking; but much as human acquaintanceship has increased, great as our advancement has been in the promotion of the study and in the development of the science and art that rule the relationship among states, international law and diplomacy, we still have to confess our failure to reach a formula whereby a democracy of world states could be confidently established; a formula within which, vested with equal rights, equal representation, opportunity and equal responsibility, nations could freely, without fear or malice, labor for their own and earnestly and sincerely coöperate to the attainment of the common well-being—a formula candidly expressed by another great humble and human political idealist in the words "*El respeto al derecho ajeno es la paz*" (among people, as among nations, peace cannot be attained without due respect to the rights of others), paraphrasing words previously uttered by the Serene Founder of our Christian civilization when He said: "Do not do unto others that which you would not wish to have done unto you."

I hope I shall trespass on no feelings if I am permitted to be bold enough to express the opinion that democracy, and particularly our continental democracies, are entitled to the self-satisfaction of having been at all times within their short existence earnest and hearty seconders, when not the promoters, of sincere, open international endeavors for World understanding, conciliation, and peace. In this hemisphere we are the founders of the only continental non-political association of states so far recorded, which, if no other, is serving the purpose, worthy indeed, of bringing us together, on a basis of unalterable equality and mutual respect, around a table where, in our deliberations to attain unanimous coöperation in matters that affect our common betterment, we cannot fail to approach each other unsophisticatedly, without prejudice or reserve, and, consequently, spiritually comprehend and know each other better. We believe in the efficacy and have been respectful observants of the practice of arbitration for the equitable and peaceful settlement of our international disputes. The first international treaty for the limitation of armaments was signed and has been faithfully observed by two of our young leading democracies. We have with unanimous accord

thrown wide open our frontiers for the construction of a Pan American highway which gives unrestricted access to all to our countries and to our peoples, to our hearts and to our minds, to our material and to our spiritual treasures; and without other restrictions than those due to reciprocal respect we have worked to promote and enhance in all possible ways intercontinental coöperation, understanding, and knowledge.

In no small part the little progress we have been able to make toward the attainment of our common purposes has been due to the willingness of our governments—as it behooves democracies—to heed public opinion, and in no smaller part to the generosity of the able men who direct it, and who freely, disinterestedly, and with devotion put at the service of all their knowledge, their experience, their time, and their energy.

We gather tonight to pay homage and honor, in a Silver Anniversary, to the group of able, disinterested, public-spirited men who 25 years ago, upon their own initiative and with a wise comprehension, freely putting their capability, their experience, their time and energy at the disposal of a cause beneficial to all, harmful to none—“*to foster the study of international law and promote the establishment of international relations on the basis of law and justice*,”—integrated the American Society of International Law, which consistently, ably, and fruitfully working in the pursuit of the dictates of its founders, has rendered noble service to all, and deserves the good will and appreciation of all. I hope I am not mistaken if I venture to interpret the presence here of my colleagues of the foreign diplomatic corps as a recognition that makes good my own testimony.

THE TOASTMASTER. The last speaker of the evening comes to us tonight in a twofold capacity. His professional one is Chairman of the Committee on Foreign Affairs of the House of Representatives of the United States. His personal capacity is the one in which we wish to welcome him. Exactly 25 years ago Mr. Temple attended the dinner celebrating the first session of the American Society of International Law in the City of Washington, in the Willard Hotel, in the very room in which we are meeting tonight to celebrate the 25th anniversary.

Ladies and gentlemen, you are in the presence of one who rocked, as it may be said, the cradle, but whose fortune it has not been to follow the hearse. It is a very live body, full of ambition, full of vigor, starting upon its new period of 25 years. I understand on good authority that the first 25 years are the most difficult in all associations of this kind. Mr. Temple—

REMARKS OF HON. HENRY W. TEMPLE

Members and friends of the American Society of International Law: It is somewhat surprising to me that anybody but myself would remember that I had the honor to be here at the meeting 25 years ago. I was here, and I enjoyed the occasion very heartily, listening to Secretary Root, former Secre-

tary Olney, Lord Bryce, and General Horace Porter, one of the most effective of after-dinner speakers.

The President has been kind enough to say that I am welcome in my personal capacity; but I imagine that there are some things that I have had an opportunity to see and know as a member of the Foreign Affairs Committee in which the members of this Society will be interested, if I may be welcomed in that capacity to say something to you that I hope may help our committee in its future work in the House of Representatives.

The Secretary of State knows that during the past winter we have done some things up there that are of importance in reference to the Department over which he so ably presides. A bill was passed reorganizing the foreign service both as to the clerks and as to the foreign service officers, which I believe the Secretary of State considers a rather important achievement. It was a long time coming.

A bill was introduced something more than a year ago by Mr. Linthicum of the House, passed the House, went to the Senate, and was there amended by the addition practically of another bill—the first one reorganizing the clerk force in foreign countries; the second one reorganizing the foreign service officers, diplomatic and consular. The bill was sent to conference about ten months ago, and we almost despaired of getting any agreement in the conference committee until the State Department came to the aid of the conference committee, and the bill was practically rewritten in conference to the satisfaction of the State Department, I think, and of the conferees from the Senate and the conferees from the House; and it was passed, and will go into effect on the first of July.

It has not reorganized the State Department in Washington, but it has reorganized the machinery through which our relations with foreign governments are carried on. It puts our foreign service officers on a better footing than they have ever been on before, in one particular—it increases their salaries, and it makes it possible for a man to go into the foreign service with the expectation of spending his life there. There are no extravagant salaries; but the foreign service officers now will be practically on an equality with the army officers and the navy officers so far as their own comfort is concerned, with retirement pay when they reach retiring age.

We spend about \$750,000,000 a year, not in preparation for war, as some of our friends say, but in maintenance of the army and navy as an insurance against war; and I believe that the maintenance of a navy and an army is found by most nations to be one of the means of preventing war. An army is not intended to make war. It is intended to make peace when war comes; and so is a navy. Therefore, I am not condemning the expenditure of a sufficient amount on this insurance policy. The premiums are high; and as compared with \$750,000,000 a year for the army and navy, we spend about \$18,000,000 a year for the agency that carries on negotiations with an attempt to keep the army and navy out of the picture.

We can afford to spend more on the foreign service and on the State Department. If it is true that war is the failure of diplomacy, we should carry more of the better kind of insurance. It is the only department in the Government which I have ever criticized for not asking for enough money when we have to handle the appropriation bills. It may be a surprise to most of the members of the International Law Society to know that the Congress does not originate the annual appropriations. The money needed is asked for by the executive branch of the Government, and the amount required is stated by the President in his budget message. Not one year—oh, yes; one, only one year—in the last twenty since I have been a member of Congress has Congress given the executive branch of the Government as much money as it asked for. We would like to give the State Department more, I think, when they know just exactly how they want to use it to better advantage.

There is one other thing that we are doing for the good of the foreign service. A few years ago a foreign service buildings commission was created to put up, in capitals and other important cities outside of the United States, proper buildings for the occupancy of representatives of the United States and for their office forces. Quite recently you may have seen something in the newspapers about a fire in a building in Berlin which we have recently purchased. The newspaper reports have not been quite accurate about that. The title has not been transferred to the United States as yet, and the loss by fire of course falls on the owners. It is to be transferred to us when certain tenants still occupying it have been disposed of. It is not to be merely an ambassador's residence. The ambassador is to live in one wing of it, but, if I am not mistaken, an office force of about 150 people are to be taken care of. All the agencies of the United States in the city of Berlin—diplomatic, consular, all the other representatives of the Treasury, of the Health Service, of the Immigration Service, amounting to something like 160 persons—are to be accommodated in this building.

It does seem to me that while we do not need office buildings as large as those that we need in Washington, we need office buildings as good for the force that occupies them. There has been some criticism on the policy of spending money on office buildings in foreign countries. We need office buildings for our workers, comfortable quarters for those who are attending to the business of the United States.

Why am I talking about this to the members of the Society of International Law? Because you can help us in the development of a public sentiment in support of these things if you believe they are wise. You are interested in the foreign service. You are interested in international law as the guide of the officers that are carrying on our relations with foreign countries. We have a great deal of business to do. It should be carried on upon principles of justice, upon principles of good will, and the development of good will through courtesy, through proper treatment.

If our foreign service officers are to do that as our agents in foreign countries, we ought to give them all the facilities for doing it, and we ought to make them comfortable while they are doing it. I am simply asking the members of this Society and others who are here who are interested in these things, and believe in the policies that are expressed in these two lines of action, to help us create public sentiment.

It may be that the legislator who knows the value of kindling a fire in the rear to liven up the representatives on the Hill is apparent in what I am saying now; but I do know that while the men on the Hill are not lying with their ears to the ground merely for the sake of reflection, we do want to know what public sentiment is; and, more than that, we do want to have public sentiment developed along lines that we know are right lines; and we cannot carry these things through without support from the people. I hope you will help us.

The TOASTMASTER. Ladies and gentlemen: On behalf of the American Society of International Law, I express to the Chief Justice of the United States, to the Dean of the Diplomatic Corps, and to the Chairman of the Foreign Affairs Committee of the House of Representatives, the appreciation of the members, for not only accepting our invitation but for making the 25th dinner of the Society equal to the very first, and to assure His Excellency, the Secretary of State, how deeply his fellow members appreciate his courtesy in accepting our invitation to spend these evening hours in our company, after a busy day spent out of the city. On behalf of the American Society of International Law, I extend grateful thanks to the members of the Diplomatic Corps who have accepted our invitation and honored us by their presence; and to the members of the Society who have found it possible to remain after the close of the session, and to meet with us here in the very room, so to speak, in which we were born, or in which we partook of our very first meal.

And now, ladies and gentlemen, extending to you on behalf of the Society an invitation to attend the 50th anniversary of the American Society of International Law, I declare this pleasing and profitable evening spent together, in what may be considered an extraordinary session, closed.

But before separating, I shall ask Father Nevils, President of Georgetown University, to dismiss us with the benediction.

Rev. Dr. W. COLEMAN NEVILS offered the following benediction: We give Thee thanks, our God, for these and all the gifts which we have received at Thy bountiful hands. Through Christ our Lord. Amen.

LUNCHEON OF EXECUTIVE COUNCIL AND BOARD OF EDITORS

The Carlton Hotel, Thursday, April 23, 1931, 12.30 o'clock p. m.

Present:

JAMES BROWN SCOTT

JOSEPH W. BINGHAM	ARTHUR K. KUHN
EDWIN M. BORCHARD	CHARLES E. MARTIN
CHARLES HENRY BUTLER	PITMAN B. POTTER
EDWIN D. DICKINSON	JACKSON H. RALSTON
CLYDE EAGLETON	JESSE S. REEVES
CHARLES G. FENWICK	LEO S. ROWE
GEORGE A. FINCH	ELLERY C. STOWELL
CHARLES NOBLE GREGORY	HENRY W. TEMPLE
CHARLES E. HILL	CHARLES WARREN
DAVID JAYNE HILL	GEORGE W. WICKERSHAM
MANLEY O. HUDSON	GEORGE GRAFTON WILSON
CHARLES CHENEY HYDE	ROBERT R. WILSON
WILLIAM K. JACKSON	LESTER H. WOOLSEY
PHILIP C. JESSUP	QUINCY WRIGHT

The PRESIDENT (Mr. James Brown Scott). Gentlemen, we know why we are here. We are here because we are beginning, as we hope, the second period of 25 useful years. You will be pleased to learn that this is a luncheon which involves the Society in no expense. It is not from the large and overflowing coffers of the Society. It is an outside matter. I hope that on the second anniversary of 25 successful years we shall have the pleasure of meeting around this board under similar circumstances and upon a like invitation, which is here and now extended to all of you.

It is a luncheon without a toastmaster, and no one will be called upon to speak or is expected to indulge in personal observations or views. Nevertheless, if anyone desires to say anything, the time is at his disposal, whether it be relevant or irrelevant, and there is no time limit.

As regards myself, I can only say that I have not looked forward to a 25th anniversary. It never occurred to me that such an occasion would present itself. Therefore, it has come as a sort of surprise and perhaps because it is a surprise, it has been the more welcome.

Twenty-five years! May I make one statement and then take my seat? Shortly before that period, I had been invited to a chair of law in the Columbia University Law School. President Draper, of the University of Illinois, was anxious to have me remain and he was willing to make certain concessions, none of which interested me because of their financial character. I stated that I should be glad to remain, and to remain as long as the university cared to have me carried upon its rolls, if he would request the trustees of the University of Illinois to permit the establishment of a journal of

international law. He said that he did not see the feasibility of such a journal. Therefore, I accepted the appointment to Columbia University which had been offered to me.

I understand the journal has been published for well-nigh 25 years. I merely mention that to show you that my heart was always in it. It is in it now, and nothing can give me greater pleasure in the years which come, alas with too great frequency, than the meeting every year of the Society in the city of Washington. Nothing has given me greater pleasure today than to see so many of the busy members, especially of the Editorial Board, who have gathered here to pass a few happy moments together before taking up the official business of the American Society of International Law—a Society which has justified twenty-five fold its purpose to foster the study of international law and to promote the establishment of international relations upon the basis of law and justice.

While it is not our purpose to insist that anyone should speak, I have observed the presence at least of a few from whom we all would be delighted to hear. We would like especially to hear from our dear and good friend Charles Noble Gregory, who was present at the initial luncheon of the Society at Lake Mohonk in 1905.

MR. CHARLES NOBLE GREGORY. Dr. Scott, you take me very much by surprise, exactly as old age has taken me by surprise. I remember with great pleasure, Mr. President, that a quarter of a century ago, when we were both very much more fur-bearing animals than we are now, we became fellows in what I ventured to believe was a great and a noble cause. We shared, with many others, in founding this Society which, under the indefatigable leadership of our honored president, *whose labors have been those of a hundred men and whose accomplishments have been those of a thousand*, has gone on with its publication to render, I believe, the very highest service not only to our own country, but I hope to the world. We have made the consideration of international affairs upon lines of *justice, justice, justice*,—that great and controlling factor in life,—we have made that a matter of common and general interest. As to our publication, which goes on under the lead of my honored friend and neighbor (Professor Wilson), Lord Bryce once said to me, "Every article in the *American Journal of International Law* is a good article." There may be those who differ, but I am not one.

Gentlemen, I would recall at this time the memory of all those good companions who started with us and whom time has taken from us. I feel that they look down upon us with approval and we look up to them with reverent and affectionate memories.

DR. DAVID JAYNE HILL. Gentlemen, I am drawn from my seat by an irresistible impulse. I stand before you without knowing what I am going to say but with a strong feeling that it would be not inappropriate for me to say something.

I cannot date back my connection with the *American Journal of Inter-*

national Law to its cradle, but I helped to wash and dress and give medicine to the child later on. I have a very vivid gallery of pictures in my mind at this moment dating back to 1907 when an American delegation came to The Hague, where by some mysterious chance I happened to be the Minister at the time, to attend the second conference for international peace. If that conference had any value,—and I believed then and I believe now it had great value,—it grew out of a purpose felt by all the members of our delegation especially, but not shared in equal degree by all the delegations that were present upon that occasion, that justice should not be confined to territorial borders, that states as juristic entities furnished a suitable foundation for a higher and universal jurisprudence, an international jurisprudence based on a rational human jurisprudence. We were all very much at sea at that time with regard to all the great international questions, some of which have been perhaps definitively settled since, but others I think are still open, and wide open.

International law—what was it? An abundance of text books, and good text books at that time existed, but what were those text books? They were the expressions of individual persons, learned opinions, thoughtful opinions, sketches and outlines of great things that might be generally accepted by civilized states in some vague manner; but definitively what was international law? It was something to be found out; not so much to be *made*, as to be *discovered*, yet rooted and grounded in our human nature as rational and at the same time passionate biological specimens associated together, naturally as well as artificially, in various forms of local societies and in federated societies.

What could we do for international law? The first conference, in 1899, with which I had the honor to be connected as an officer of the Department of State, realized the importance of international law, also its inchoate condition, but had not really got down to specific questions to any great extent. This conference was called in the interest of disarmament. Europe was bristling with arms, and armament increasing. That meant eventual conflict,—war. How to avoid it? Well, perhaps by setting up some kind of a judicial organization. Our country was the first that ever officially proposed a definite judicial tribunal of an international character. It happened to be my good fortune to be in the Department of State when the opportunity for this came up; and, because I had personally happened to think a little about that subject long before that, and even had written about it,—I was invited in conjunction with that fine old English gentleman, Lord Pauncefote, to consider together what we should do, and out of it, on our part at least, came the suggestion of an international court of justice. Our delegates to the first conference were instructed to work for that end, not with much expectation that anything definitive could be quickly accomplished, but regarding it as a far off event possessing the possibility of ultimate realization.

Our British friends were not at that time so much interested, if I may say so, in anything like a strictly legal court of international justice. They have never been much interested in pre-written law. They like to make law themselves as they go along. That is not unnatural, and it may to some extent have its advantages. They were, therefore, not warm for the court of justice as proposed. Such a court would require apparently a definitive law—a law developed into written form, so to speak,—at least a formal statement of principles of some kind, something that could really be called law and not simply custom, not simply opinion, not simply theory. They were not ready for that kind of law. They were, happily, strong for arbitration, so we got out of the first conference a tribunal for arbitration to which we have several times resorted, and other nations too, and I think on the whole with very happy results.

When Dr. Scott, as the adviser in international law, for which he was well qualified, came to The Hague, in 1907, he and I coalesced like two drops of water. You must remember it, James Brown?

Dr. SCOTT. I do.

Dr. HILL. How we rushed to each other's arms?

Dr. SCOTT. I have been there ever since.

Dr. HILL. We have been great friends ever since.

At that time came up this question about a journal of international law. It was already a conception that had been given form and substance. Personally I was invited to participate in it, and although I was in official life at the time, I felt that in such a cause it was entirely appropriate that I should participate, and so I became one of the editorial staff very early, and have continued until very lately.

As I look back over these 25 years of the existence of the *Journal*, I have seen it grow in value and in authority. I cannot conceive of any leadership that could have accomplished more or even that could have accomplished so much, because here was a background of adequate learning, of absolute zeal and devotion, and above all a permanent and deeply-rooted idea that justice, if we could only ascertain what it is and how it is to be determined and applied, should rule the nations as well as individual men. In that period we have not always thought alike, but it is astonishing with what unanimity we have thought and acted and worked together.

I am talking too long; I did not know I had so much to say; and yet I realize now I have a great deal more which I shall not inflict upon you. I want to extend my heart and my hand across the table to you, my dear Dr. Scott.

Mr. GEORGE W. WICKERSHAM. If I may be permitted to add a word or two, I should say, in the first place, my excuse for doing so does not lie in my long association with this Society, but upon the fact that for three years I had the honor to be President of the Association of the Bar of the City of New York, in whose building this Society was born, on the 12th day of Janu-

ary, 1906. Three years later, I came down here to Washington as Attorney General of the United States. The first thing that happened to me was an invitation from Dr. Scott to attend one of the meetings of this Society. I told him I was not a member. He said he would soon correct that, and I quickly found myself a member and an interested participant in the occasion. I have followed the deliberations and the work of the Society with constant interest ever since.

I have always marveled that this *Journal* has maintained such high excellence and has had such an increasing influence and position in international thought, but I reflect that Horace Walpole once said that virtue is the compensation given to the poor for the lack of riches. The coöperative effort of a body of men giving their services without reward to this great task, for a society that had very little in the way of material resources, has eventuated in establishing a journal of primary importance in the world touching the subjects with which it concerns itself, until today the *Journal* of this Society enjoys an authority second to none and has a practical adaptability and usefulness which I think is primary over all others. My interest in that work has been quickened by the fact that its direction was in the hands of a man whom I first met some forty-odd years ago and with whom I have enjoyed a friendship ever since which has been one of the bright things in my life and experience.

A peculiarly happy circumstance finds me here on this occasion to add to the well-earned encomiums which have been heaped upon Dr. Scott my own humble tribute of unflinching and continued regard and admiration. I hope he may be here when the next 25th anniversary is celebrated and then enjoy once more the same well-earned rewards that are his today.

Mr. ARTHUR K. KUHN. I think the excuse for my rising to my feet may be simply my desire to express the appreciation of the more youthful members of our group in addition to what has been said by the elder statesmen. I was not present at Mohonk prior to the formation of the Society, although I later became a member of that well-known group; but I was present at the launching of the Society on the 12th day of January, 1906, at the Bar Association in New York.

I think you will remember, Dr. Scott, that I took somewhat of an active part in the discussions as to the direction which I hoped the Society would take in its work. I feel happy in saying that it was one of my greatest pleasures to join in with older men, wiser men, more experienced men, to learn from them and be stimulated by them. That is the tribute I wish to pay to you, Dr. Scott, and others of the initiating group today.

There is one feature I would like to accentuate in your work as leader and inspirer of the small nucleus out of which the Society eventually grew. International law has to my mind a double aspect. It is regarded, and rightly so, as a universal science, a science tending (if not in actual fact) to be universal everywhere and among all nations. We know, especially the

practitioners among us, that this is a council of perfection which has never been realized, and I am afraid that even within the *next* 25 years it will not be realized. But international law also has another aspect with which this Society is most intimately connected, and that is its national aspect, for each nation has its own concept of what international law is, or ought to be. In order that each nation shall organize, develop and promote the best and highest ideals in international law, it is necessary that the trained legal minds who have given attention to that phase of law should have an opportunity to work in common. It is that, it seems to me, which has been the outstanding contribution which this Society and the *Journal* have made to the life of our nation. We are rightly termed an American Society, and an American Society we must remain.

As I look back over the first 25 years of our existence, I am sure the various Secretaries of State, the heads of departments, and even the Presidents, must have felt that we have at least made a worthy contribution in organizing the legal minds of our country for the expression of what is the best and the highest in that science from the point of view of American practice and American policy. In organizing such a group, placing it upon an active basis, and continuing with its labors over a quarter of a century in the notable manner in which you, Dr. Scott, and your associates have done, you have made a memorable contribution to the life and work of our nation and our Government. As a younger member I bring that tribute and lay it at your feet today. I trust that you may go on for many, many years in the active work of the Society, and that in the years to come, when some of us, yea, all of us are no longer here, that the impetus of 25 years ago may go on and on, helpfully upholding the best of American traditions and American ideals.

Dr. LEO S. ROWE (Director of the Pan American Union). If I may be permitted to add just a word to this splendid tribute which is being paid to the Society and to our distinguished president, Dr. Scott, I should like to say just a word with reference to the services which the Society, and in particular the President of the Society, have rendered to the organization with which I happen to be associated and to the cause of international law throughout Latin America. I doubt whether we all realize how much the Spanish edition of the *Journal of International Law* has contributed to awakening interest throughout the countries of Latin America in the study of international law. When we add to this the fact that our President has been instrumental in stimulating the organization of societies of international law throughout Latin America, we begin to realize the magnitude of the service which the Society has rendered and for which the Society is largely indebted to its present President.

I want to add another word with reference to the special work of the Pan American Union. During the ten years I have been associated with the Union we have constantly had occasion to request the coöperation of

the Society and also to request the coöperation of the American Institute of International Law in connection with preparation for international conferences with American states. Such coöperation has always been readily accorded, and has contributed considerably to the positive achievements of the International Conferences of American States. I desire to take this opportunity to pay tribute to the Society and to express my deep and lasting sense of gratitude to our distinguished President.

The PRESIDENT. Gentlemen, I had no thought whatever that personalities would be indulged in. My idea was that we would come here, break bread together, and talk over the things we have in mind. Allow me to reciprocate from the bottom of my heart. If I have done anything whatever in connection with the American Society of International Law and with the *Journal*, it is because of association. It has not been an individual work. It has been a coöperative and collective work.

Deeply grateful I am to those who no longer hear my voice and are beyond the reach of any earthly voice, the older members with whom I was permitted to associate; and equally grateful I am for the privilege which I have, and have enjoyed for many years, of associating with the younger members who now have entered into the Society, have taken charge of its organization, have taken charge of its present functioning, and especially have taken into their charge and under their guardianship the *American Journal of International Law*. I am happy because of these things, but greater than those things is the memory and appreciation of the older and the friendships of the oncoming generation.

Let me refer to a memorable incident in the history of Greece. The older members—Dr. Hill, Professor Gregory, Mr. Wickersham and I—have only heard the faint sounds of the victory at Yorktown ringing in our ears as an early recollection. There was an occasion upon which the friends of one Miltiades, who was in command of the coming of Hellas, at the time in question, wished to erect a monument to him. The Greeks, a very intelligent people, a very reasonable people, replied that they would be delighted to do so if Miltiades could prove that he was the only person at Marathon. The statue has still to be erected.

Gentlemen, this is a collective movement, this is a coöperative movement in which I happened to bear perhaps the laboring oar, but all of us pulled together, all of us in the same boat, and all of us at the end of Life's tempestuous journey, swinging slowly, gracefully and peacefully at anchor.

MINUTES OF THE EXECUTIVE COUNCIL

Thursday, April 23, 1931

The Executive Council of the American Society of International Law met at No. 700 Jackson Place, Washington, D. C., on Thursday, April 23, 1931, at 2.30 o'clock p. m.

Dr. JAMES BROWN SCOTT, the President of the Society, presided.

The SECRETARY called the roll and the following members were present:

CHANDLER P. ANDERSON	WILLIAM K. JACKSON
JOSEPH W. BINGHAM	ARTHUR K. KUHN
CHARLES HENRY BUTLER	CHARLES E. MARTIN
WILLIAM C. DENNIS	JAMES BROWN SCOTT
CLYDE EAGLETON	ELLERY C. STOWELL
GEORGE A. FINCH	HENRY W. TEMPLE
CHARLES NOBLE GREGORY	CHARLES WARREN
CHARLES E. HILL	GEORGE GRAFTON WILSON
DAVID JAYNE HILL	ROBERT R. WILSON
MANLEY O. HUDSON	LESTER H. WOOLSEY

QUINCY WRIGHT

The minutes of the meetings of April 24 and April 26, 1930, were approved as printed in the *Proceedings* of the Society and their reading was dispensed with.

The SECRETARY reported the following communications and action upon them was taken as indicated:

Letter of December 3, 1930, from Dexter Perkins, Secretary of the American Historical Association, enclosing certain resolutions adopted by the Council of that Association in regard to publications of the State Department. The resolutions were referred to Mr. Quincy Wright as a committee of one to report upon them to the Executive Council at its next meeting.

Letter of December 19, 1930, from the Chairman of the *Vredes-En Volkenbondstentoonstelling 1930*, The Hague, requesting a complimentary set of the *Journal* for permanent exhibition in the Peace and League of Nations Exhibition at The Hague. The Secretary was directed to reply that the Society regretted it does not have a set of the *Journal* available for this purpose.

Letter of March 4, 1931, from Manley O. Hudson, submitting copies of correspondence with the Secretary of State concerning the registration of treaties concluded by the United States. The letter and correspondence were ordered spread upon the minutes of the Executive Council. They read as follows:

HARVARD LAW SCHOOL
CAMBRIDGE, MASSACHUSETTS

March 4, 1931

MR. GEORGE A. FINCH,
Secretary, American Society of International Law,
Washington, D. C.

Dear Colleague:

I submit herewith, for your information and records, copies of the correspondence with the Secretary of State concerning the registration of treaties concluded by the United States.

Faithfully yours,

MANLEY O. HUDSON

HARVARD LAW SCHOOL
CAMBRIDGE, MASSACHUSETTS

January 27, 1931

HONORABLE HENRY L. STIMSON,
Secretary of State,
Washington, D. C.

My dear Mr. Secretary:

I take pleasure in enclosing to you a letter concerning the registration of treaties of the United States with the Secretariat of the League of Nations. This letter is signed by sixty teachers of courses in international law and international relations in American universities and colleges.

I hope the letter may have the serious consideration of the Department of State.

With assurance of my high esteem, I am

Faithfully yours,

MANLEY O. HUDSON

[Enclosure]

January 28, 1931

THE HONORABLE,
The Secretary of State,
Washington, D. C.

Sir:

As teachers of international law and international relations in American universities, law schools, and colleges, the undersigned have been for some time interested in having the League of Nations Treaty Series made more complete. This publication, now in its eleventh year, is the most useful general collection of current treaty texts available in the world. Its inauguration in 1920 was in line with a recommendation made by the *Institut de Droit International* in 1891, and with the purpose for which a Diplomatic Conference was held at Berne in 1894, at which the United States was represented. Since it was inaugurated, one hundred volumes have been published. The value of the series was recently recognized by the Department of State when it purchased twenty-eight sets of the Series for use in the Department and for distribution to American missions abroad. One hundred and twenty-three libraries in the United States are now subscribing for the Series.

Many of the treaties of the United States and most of its very recent treaties are published in the League of Nations Treaty Series, following their registration at the request of the other parties. In 1926 the Government of the United States sent a communication to the Secretary-General of the League of Nations to the effect that "henceforth it will send regularly to the Secretariat treaties contracted by the American Government and included in the United States Treaty Series." 48 League of Nations Treaty Series, p. 444 note.

It is the understanding of the undersigned that since that date, treaties published in the United States Treaty Series and agreements published in the Executive Agreement Series are

regularly communicated by the Department of State to the Secretariat of the League of Nations. The practice of the Secretariat is that if the other parties have not already proceeded to the registration of a treaty sent by the United States, they are asked if they desire to proceed to it. This sometimes involves long delay, as for example, in the case of the Inter-American Convention on Conciliation of January 5, 1929, which was communicated to the Secretariat by the United States on June 13, 1929, but was not registered until April 4, 1930. In time, however, most of the United States treaties are registered by other parties. But certain treaties of the United States are not registered, though they are published with special serial numbering: thus the treaties published as Nos. 1B-6B, respectively in Volumes 48, p. 443; 54, p. 441; 68, p. 459; 85, p. 491; and 87, pp. 421 and 454, of the League of Nations Treaty Series.

The undersigned are of the opinion that it would be desirable for the United States to register its treaties in the same way as is done by the great majority of other states. They respectfully submit that without recognizing any obligation to do so under Article 18 of the Covenant of the League of Nations, and without recognizing any legal effect of the second sentence of that article, the United States should establish a practice of requesting registration of its treaties. In this, it would be following the precedent set by Germany in 1920 as a non-member of the League of Nations. Moreover, the United States is a signatory to the Convention on the Suppression of Counterfeiting Currency, of April 20, 1929, and the Protocol Relating to Military Obligations, of April 12, 1930, both of which provide for registration with the Secretariat of the League of Nations.

The registration of its treaties by the United States would not only regularize the serial numbering of those United States treaties which are now published but not registered; it would make it possible for treaties of the United States to be cited in the uniform way applicable to the treaties of other countries, and it might also have the result of encouraging other states to effect the registration, to be followed by publication, of numerous treaties which may not otherwise find place in the League of Nations Treaty Series. The Undersigned are interested from a scientific point of view in having available as nearly as possible the texts of all treaties, and in making a single method of citation applicable to all; and their scientific interest would be served by action by the United States as suggested.

In view of these considerations, the undersigned have the honor to request that the Secretary of State give favorable consideration to the inauguration of a practice of requesting the Secretariat of the League of Nations to register the treaties and international engagements which the United States may make from time to time. We submit for your consideration that the President and Secretary of State are competent to take such action on their own authority.

With assurance of our respect, we are, Mr. Secretary,
Faithfully yours,

(Signed)

JOSEPH W. BINGHAM, Professor of Law, Stanford University

GEORGE H. BLAKESLEE, Professor of History and International Relations, Clark University

PHILLIPS BRADLEY, Associate Professor of Political Science, Amherst College

HERBERT W. BRIGGS, Assistant Professor of Government, Cornell University

PHILIP MARSHALL BROWN, Professor of International Law, Princeton University

CHARLES K. BURDICK, Dean of the Cornell Law School

J. M. CALLAHAN, University of West Virginia

HERMAN B. CHUBB, Assistant Professor of Political Science, University of Kansas

KEITH CLARK, Assistant Professor of Political Science and Acting Chairman, Department of History and Political Science, Carleton College

KENNETH COLEGROVE, Professor of Political Science, Northwestern University

EDWIN D. DICKINSON, Professor of Law, University of Michigan Law School

D. SHAW DUNCAN, Head of Dept. of History and Political Science, University of Denver

- CLYDE EAGLETON, Associate Professor of Government, New York University
 LAWRENCE D. EGBERT, Assistant Professor of Political Science, Northwestern University
- ELLEN DEBORAH ELLIS, Mount Holyoke College
 CHARLES G. FENWICK, Professor of Political Science, Bryn Mawr College
 GEORGE EMORY FELLOWS, Professor of History and Political Science, University of Utah
 EMERSON D. FITE, Thompson Professor of Political Science, Vassar College
 KEENER C. FRAZER, Associate Professor of Government, University of North Carolina
 JAMES W. GARNER, Professor of Political Science, University of Illinois
 KARL F. GEISER, Professor of Political Science, Oberlin College
 WILLIAM H. GEORGE, Dean of the College of Arts and Sciences, University of Hawaii
 LELAND M. GOODRICH, Assistant Professor of Political Science, Brown University
 CULLEN B. GOSNELL, Professor of Political Science, Emory University
 J. EUGENE HARLEY, Associate Professor of Political Science, University of Southern California
- THOMAS H. HEALY, Associate Professor of International Law and Foreign Relations, Georgetown University School of Foreign Service
 CHARLES E. HILL, Professor of Political Science, George Washington University
 NORMAN L. HILL, University of Nebraska
 FRANK E. HINCKLEY, Lecturer on International Law, University of California
 ALICE M. HOLDEN, Associate Professor of Government, Smith College
 N. D. HOUGHTON, Associate Professor of Political Science, University of Arizona
 MANLEY O. HUDSON, Bemis Professor of International Law, Harvard Law School
 WILLIAM I. HULL, Professor of International Relations, Swarthmore College
 PHILIP C. JESSUP, Assistant Professor of International Law, Columbia University
 JOHN H. LATANÉ, Walter Hines Page School of International Relations, Johns Hopkins
 CHARLES E. MARTIN, Professor of International Law, Head of the Political Science Department, University of Washington
- FREDERICK A. MIDDLEBUSH, Dean of the School of Business and Public Administration and Professor of Political Science and Public Law, University of Missouri
 ROLAND S. MORRIS, Professor of International Law, University of Pennsylvania
 CHARLES W. PIPEIN, Professor of Comparative Government, Louisiana State University
 PITMAN B. POTTER, Professor of Political Science, University of Wisconsin
 KIRK H. PORTER, Professor of Political Science, State University of Iowa
 HAROLD S. QUIGLEY, Professor of Political Science, University of Minnesota
 BESSIE C. RANDOLPH, Professor of Political Science, Florida State College for Women
 HELEN D. REID, Assistant Professor of History and Political Science, University of Buffalo
- JESSE S. REEVES, Professor of Political Science, University of Michigan
 JAMES BROWN SCOTT, Professor of International Law, Georgetown University School of Foreign Service
- HECTOR G. SPAULDING, Professor of Law, George Washington University
 HENRY R. SPENCER, Professor in Ohio State University
 DANIEL C. STANWOOD, Professor of International Law, Bowdoin College
 ELLERY C. STOWELL, Professor of International Law, American University
 ALBERT D. THOMAS, Professor of Political Science, University of Utah
 J. VAN DER ZEE, Professor of Political Science, University of Iowa
 HAROLD M. VINACKE, Professor of International Law and Politics, University of Cincinnati
- ROYAL B. WAY, Professor of Political Science, Beloit College
 HOWARD WHITE, Professor of Government and Politics, Miami University
 JOHN B. WHITTON, Associate Professor of International Law, Princeton University
 BENJ. H. WILLIAMS, Professor of Political Science, University of Pittsburgh

GEORGE GRAFTON WILSON, Professor of International Law, Harvard University
 QUINCY WRIGHT, Professor of Political Science, University of Chicago
 HAROLD ZINK, Professor of Political Science, De Pauw University

DEPARTMENT OF STATE

WASHINGTON

February 27, 1931

PROFESSOR MANLEY O. HUDSON,
 Law School of Harvard University,
 Cambridge, Massachusetts.

Sir:

The Department has received your letter of January 27, 1931, with which you enclosed a letter signed by sixty teachers of courses in international law and international relations, concerning the registration of treaties of the United States with the Secretariat of the League of Nations.

I assure you that the communication has received careful consideration by the Department of State. The Department feels, however, that in view of the fact that the United States is not a member of the League of Nations, it would be inappropriate for this Government to register treaties with the Secretariat.

Very truly yours,

For the Secretary of State,
 W. R. CASTLE,
 Assistant Secretary

The SECRETARY then made the following report on the membership of the Society:

Membership as of July 1, 1930:		
Honorary members.....	7	
Life members.....	26	
Annual members.....	1,250	
		1,283
Losses in membership since July 1, 1930:		
Resigned.....	56	
Deceased.....	8	
Dropped for non-payment of 1930 dues.....	50	
		114
		1,169
New members added since July 1, 1930:		
Life members.....	3	
Annual members.....	67	
		70
Membership as of April 21, 1931.....		1,239
Total decrease since July 1, 1930.....		44

The SECRETARY also submitted the following report on subscriptions to the *American Journal of International Law*:

Subscriptions cancelled since April, 1930.....	75
New subscriptions since April, 1930.....	65
Net loss.....	10
Total number of subscriptions to date.....	1,080

The TREASURER submitted a report for the year January 1-December 31, 1930, showing separately the investment account, the receipts and disbursements in the business account, and the assets and liabilities. After an oral explanation of various items in the report, it was, upon motion duly made and seconded, received, approved and ordered to be filed.¹

A report from F. W. Lafrentz & Co., certified public accountants, upon their audit of the Society's accounts for the year ended December 31, 1930, was also submitted by the TREASURER, read, received and ordered to be filed.

Upon motion, duly made and seconded, the following resolution was thereupon adopted:

Resolved, That the thanks of the Society be expressed for the careful and conscientious services of the Treasurer during the preceding year.

The EDITOR-IN-CHIEF of the *American Journal of International Law* referred to the four numbers of the *Journal* issued during the year 1930, containing approximately 1,250 pages, in an edition of 2,750 copies, as the best evidence of the work of the Board of Editors during the preceding year. He stated that the work of the editors had been exceptionally satisfactory, and that they had promptly and fully responded to the calls upon them for the examination of manuscripts and the preparation of editorial comments and book reviews. The Editor-in-Chief presented a written statement of the work done by each editor.

Mr. KUHN, Chairman of the Committee on Selection of Honorary Members, reported that the committee had decided to recommend for honorary membership Mr. Adatci of Japan, President of the Permanent Court of International Justice at The Hague. Mr. KUHN stated that Mr. Adatci's contributions to international law were among the greatest in the East, that he has long been an annual member of the Society and that he has represented his country at Geneva in international affairs of great importance. Upon motion, duly made and seconded, the Committee on Honorary Members was authorized to present the name of Mr. Adatci to the Society for election to honorary membership.

In connection with the consideration of possible candidates for election to honorary membership, the Council discussed whether geographical representation should enter into the selection of such members. It was the unanimous opinion of the members present that no such consideration should enter into the selection of honorary members, but that they should be elected because of their individual attainments and accomplishments in the field of international law.

In the absence of the Chairman of the Committee on Increase of Membership, the SECRETARY reported that letters of invitation had been sent during the year to all teachers of law in institutions of the Association of American Law Schools, and also to all law libraries in the United States and Canada.

¹ It is printed *infra*, p. 256.

He regretted to report, however, that the responses to the letter had been far from gratifying. The Council then discussed methods of enrolling new members, and the suggestion was made that the teachers of international law who are members of the Society recommend membership in the Society to their graduate students.

Mr. FINCH, as Chairman of the Committee on Annual Meeting, laid before the Council the program of the twenty-fifth annual meeting as evidence of the work of the Committee. He reported that all members of the Committee who had been unable to attend its meeting in person, had sent letters containing suggestions, and that the program was a composite of suggestions from all members of the Committee. Mr. FENWICK criticized the program as containing nothing of interest from the academic point of view, and Mr. HUDSON thought that provision should be made for round-table discussions of a theoretical character. It was the opinion of many members that criticisms of the program should be made in advance of the meeting, and, after discussion, it was moved, seconded and carried, that hereafter, before the preparation of the program of the annual meeting, the members of the Council be requested in ample time to send their suggestions to the Chairman of the Committee on Annual meeting.

There being no further business, the Executive Council, at 4.10 o'clock p. m. adjourned.

GEORGE A. FINCH,
Secretary

Approved:

JAMES BROWN SCOTT,
President.

TREASURER'S REPORT

January 1 to December 31, 1930

INVESTMENT ACCOUNT

On hand January 1, 1930:

Cash on deposit with Union Trust Co.....	\$265.18
\$6,000 Cuba Northern Railways, 5½s (cost price).....	5,914.58
\$1,000 Argentine Government, 5½s (cost price).....	972.90
\$2,000 Australian, 4½s (cost price).....	1,853.75
\$500 Associated Gas and Electric 5s (cost price).....	457.01

Totals.....	\$9,463.42
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TRANSACTIONS DURING YEAR 1930

	<i>Receipts</i>	<i>Disbursements</i>
Jan. 1. Cash on hand at Union Trust Co.....	\$265.18	
Jan. 31. Interest on Union Trust Co. deposit.....	2.74	
Feb. 3. Life membership (Miss Laura M. Berrien).....	100.00	
Feb. 18. Interest on Union Trust Co. deposit put in Business Account.....		\$2.74
Jul. 3. Life membership (Mr. Jerome D. Greene).....	100.00	
Jul. 31. Interest on Union Trust Co. deposit.....	4.57	
Sep. 19. Interest on Union Trust Co. deposit put in Business Account.....		4.57
Oct. 21. Life membership (Mr. Charles L. Marburg).....	100.00	
Dec. 10. Purchased \$500 Illinois Power and Light Corporation 5s of 1956 at 95½.....		480.28
Totals.....	\$572.49	\$487.59

Balance on deposit in Union Trust Co., December 31, 1930.....	\$84.90
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SUMMARY

Cash on hand January 1, 1930.....	\$265.18
Three life memberships added during the year.....	300.00
Totals.....	\$565.18
Purchased \$500 Illinois Power and Light Corporation 5s at 95½...	480.28
Balance on deposit in Union Trust Co., December 31, 1930.....	\$84.90

BUSINESS ACCOUNT

RECEIPTS

January 1, 1930. Balance on deposit in Riggs National Bank.....	\$828.93
Membership dues:	
1929.....	\$191.00
1930.....	5,915.68
1931.....	205.50
Back dues.....	5.00
Advance dues.....	15.00
	\$6,332.18
Subscriptions:	
1930.....	\$2,181.00
1931.....	2,382.09
Advance subscriptions.....	24.00
	4,587.09
Foreign postage.....	431.22
Proceedings sold:	
1929.....	\$60.35
1930.....	1,006.70
1931.....	167.40
	1,234.45

Back numbers sold:		
Journals	\$1,763.20	
Proceedings	80.10	
	<hr/>	\$1,843.30
Analytical Index sold		14.70
Interest on securities:		
Cuba Northern Railway 5½%	\$330.00	
Argentine Government 5½%	55.00	
Australian 4½%	90.00	
Associated Gas and Electric 5%	25.00	
	<hr/>	500.00
Interest on deposits:		
Union Trust Company	\$7.31	
Riggs National Bank	65.00	
	<hr/>	72.31
Banquet tickets		655.00
Binding Journals for members		262.75
Special Supplement sales		35.70
Exchange on foreign subscriptions95
Extra off prints paid for		29.75
Refunds		5.74
	<hr/>	16,005.14

Beginning balance (\$828.93) and total receipts (\$16,005.14) Dec. 31, 1930 \$16,834.07

DISBURSEMENTS

Salaries:		
Managing Editor	\$2,400.00	
Clerks	980.00	
Assistant to Treasurer	420.00	
	<hr/>	\$3,800.00
Journal:		
Preparation	\$372.07	
Printing	6,909.15	
Mailing	473.87	
Off prints	234.46	
Miscellaneous	55.50	
	<hr/>	8,045.05
Annual meeting:		
Printing and postage	\$80.43	
Telegrams	8.27	
Reporting	308.00	
Banquet	739.10	
	<hr/>	1,135.80
Proceedings:		
Preparation	\$46.84	
Printing	1,296.38	
Mailing	116.34	
	<hr/>	1,459.56
Office expenses:		
Stationery and postage	\$545.96	
Telegrams and cables54	
Freight and express	7.96	
Office supplies	13.76	
Binding	350.05	
Refunds	7.00	
Miscellaneous	151.52	
	<hr/>	1,076.79

Back numbers:

Copies purchased	\$1,055.72	
Postage for distribution	68.39	
		<u>\$1,124.11</u>

Total disbursements		\$16,641.31
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SUMMARY

Total receipts during the year 1930	\$16,005.14
Total disbursements during the year 1930	<u>16,641.31</u>

Debit balance for the year 1930	\$636.17
Beginning balance January 1, 1930	<u>828.93</u>

Balance	\$192.76
Balance on deposit in Riggs National Bank, January 1, 1931	\$182.76
Petty cash	<u>10.00</u>
Totals	\$192.76

ASSETS

Investments:

\$6,000 Cuba Northern Railway 5½s at 98½ (cost price)	\$5,914.58
\$1,000 Argentine Government 5½s at 97 (cost price)	972.90
\$2,000 Australian 4½s at 92½ (cost price)	1,853.75
\$500 Associated Gas and Electric 5s at 91 (cost price)	457.01
\$500 Illinois Power & Light Corporation 5s at 95½ (cost price)	<u>480.28</u>
	\$9,678.52

Cash:

Union Trust Company (Investment Account)	\$84.90
Riggs National Bank (Business Account)	182.76
Petty Cash	<u>10.00</u>
	277.66

Accounts receivable:

Unpaid dues	261.00
	<u>\$10,217.18</u>

LIABILITIES

Accounts payable	None
1931 Membership dues paid in 1930	\$205.50
Advance dues	15.00
1931 Subscription fees paid in 1930	2,382.09
Advance subscriptions	24.00
1931 Proceedings paid for in 1930	167.40
Balance of Treaty Series, League of Nations fund	<u>120.52</u>
	2,914.51

Excess of assets over liabilities	\$7,302.67
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Respectfully submitted,

L. H. WOOLSEY,
Treasurer

MINUTES OF THE EXECUTIVE COUNCIL

Saturday, April 25, 1931

The Executive Council of the American Society of International Law met, upon the invitation of the Chairman, at his residence, 1535 Eye Street, N. W., Washington, D. C., on Saturday, April 25, 1931, at 12:45 o'clock, p. m.

Dr. JAMES BROWN SCOTT, President of the Society, presided.

The SECRETARY called the roll, and the following members were present:

JAMES BROWN SCOTT, <i>President</i>	PITMAN B. POTTER
CHARLES HENRY BUTLER, <i>Chairman</i>	JACKSON H. RALSTON
JOSEPH W. BINGHAM	JESSE S. REEVES
EDWIN M. BORCHARD	ELLERY C. STOWELL
CLYDE EAGLETON	ELBERT D. THOMAS
CHARLES G. FENWICK	GEORGE GRAFTON WILSON
GEORGE A. FINCH	ROBERT R. WILSON
DAVID JAYNE HILL	LESTER H. WOOLSEY
WILLIAM K. JACKSON	HERBERT F. WRIGHT
ROLAND S. MORRIS	QUINCY WRIGHT

The following officers were unanimously reelected, the SECRETARY, upon motions, duly made and seconded, casting a single ballot of all the members present for each of the nominees:

Chairman of the Executive Council: CHARLES HENRY BUTLER

Secretary: GEORGE A. FINCH

Treasurer: LESTER H. WOOLSEY

Members of the Executive Committee were duly elected as follows:

CHANDLER P. ANDERSON	ROLAND S. MORRIS
WILLIAM C. DENNIS	FRED K. NIELSEN
CHARLES NOBLE GREGORY	GEORGE GRAFTON WILSON
DAVID JAYNE HILL	HERBERT F. WRIGHT

QUINCY WRIGHT

The EDITOR-IN-CHIEF referred to the written report on the work of the respective editors of the *American Journal of International Law* during the preceding year, submitted by him to the Executive Council at its meeting on April 23, 1931, which he stated showed that the work of the editors had been entirely satisfactory, and upon his recommendation, the Board of Editors was reelected as follows:

GEORGE GRAFTON WILSON, *Editor-in-Chief*

GEORGE A. FINCH, *Managing Editor*

CHANDLER P. ANDERSON	EDWIN D. DICKINSON
EDWIN M. BORCHARD	CHARLES G. FENWICK
PHILIP MARSHALL BROWN	JAMES W. GARNER

MANLEY O. HUDSON
CHARLES CHENEY HYDE
PHILIP C. JESSUP
ARTHUR K. KUHN

PITMAN B. POTTER
JESSE S. REEVES
ELLERY C. STOWELL
LESTER H. WOOLSEY

QUINCY WRIGHT

Upon motion, duly made and seconded, the selection of the members of the Committee on Selection of Honorary Members, the Committee on Increase of Membership, the Committee on Annual Meeting, and the Committee on Codification of International Law, was referred to the President, with power to appoint from the membership of the Society at large, without reference to membership in the Executive Council, or in the present committees.

It was moved and carried, that it was the sense of the Council that the Committee on Increase of Membership be advised that it is the desire of the Council that the membership of the Society should be increased as largely as possible during the coming year.

Upon motion of Mr. BUTLER, duly seconded, the Executive Council

Resolved, That unless sooner adjourned on motion, the sessions of the annual meetings of the Society shall be declared adjourned at the following hours: morning sessions at 12:30 p. m., afternoon sessions at 5:30 p. m., and evening sessions at 10:30 p. m., provided that any session may be extended for not exceeding fifteen minutes on motion.

Mr. QUINCY WRIGHT, to whom the Executive Council referred on April 23, 1931, for report at its next meeting, the resolutions of the Council of the American Historical Association transmitted to the Society with a request for its coöperation, recommended the adoption of the following

RESOLUTION ON STATE DEPARTMENT PUBLICATIONS

Recognizing the importance for the scientific study of international law, for higher education in international law, and for public information on international relations, that documentary materials in this field be published as completely and as promptly as possible;

Realizing, however, that international comity and the efficient conduct of international relations may sometimes render the publication of certain documents inexpedient until a considerable time after the date of the transaction with which they are connected;

Appreciating the progress which the Department of State of the United States has made in recent years in making such materials more available in so far as they concern the United States;

Noting the interest in the matter expressed by the Conference of Teachers of International Law and Related Subjects in resolutions of 1925 (Proceedings, 1925, p. xii) and 1928 (Proceedings, 1928, pp. 154, 157, 159, 160) and by the American Historical Association in its resolution of 1930;

Recalling the resolutions of the Executive Council of this Society in April, 1928, and April, 1929 (Proceedings, 1929, p. 165; 1929, p. 264) providing for a committee to coöperate in expediting publication of such materials by the Department of State;

THE AMERICAN SOCIETY OF INTERNATIONAL LAW believes it desirable:

(1) That the Department of State, while maintaining the high standard of the recently published volumes of the United States Foreign Relations seek to bring this series as near to date as the public interest will permit;

(2) That the Department of State publish a series of proceedings of international conferences in which the United States participates, including the reports of the delegates of the United States to such conferences, as completely and as promptly as possible;

(3) That the Department of State institute a continuous series, including the award and pertinent documents, of the proceedings in international arbitrations to which the United States is a party and publish the numbers of this series as promptly as possible.

After discussion, upon motion of Mr. POTTER, duly seconded, the Executive Council decided to refer the foregoing resolution to the Executive Committee, for such action as the Committee may see fit to take, and further to authorize the President, with the advice of the Executive Committee, to appoint a committee to call upon the Department of State, if necessary, to urge a proper policy with regard to its publications.

There being no further business, the Executive Council at 1:30 o'clock p. m., adjourned, and were the guests of the CHAIRMAN at luncheon.

GEORGE A. FINCH,
Secretary

Approved:

JAMES BROWN SCOTT,
President

APPENDIX

SENATE RESOLUTION 5 OF JANUARY 27, 1926

ADVISING AND CONSENTING TO ADHERENCE OF THE UNITED STATES TO THE
PERMANENT COURT OF INTERNATIONAL JUSTICE, SUBJECT TO
FIVE RESERVATIONS¹

Whereas the President, under date of February 24, 1923, transmitted a message to the Senate, accompanied by a letter from the Secretary of State, dated February 17, 1923, asking the favorable advice and consent of the Senate to the adherence on the part of the United States to the protocol of December 16, 1920, of signature of the Statute for the Permanent Court of International Justice, set out in the said message of the President (without accepting or agreeing to the optional clause for compulsory jurisdiction contained therein), upon the conditions and understandings hereafter stated, to be made a part of the instrument of adherence:

Therefore be it

Resolved (two-thirds of the Senators present concurring), That the Senate advise and consent to the adherence on the part of the United States to the said protocol of December 16, 1920, and the adjoining Statute for the Permanent Court of International Justice (without accepting or agreeing to the optional clause for compulsory jurisdiction contained in said Statute), and that the signature of the United States be affixed to the said protocol, subject to the following reservations and understandings, which are hereby made a part and condition of this resolution, namely:

1. That such adherence shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the Treaty of Versailles.

2. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other states, members, respectively, of the Council and Assembly of the League of Nations, in any and all proceedings of either the Council or the Assembly for the election of judges or deputy judges of the Permanent Court of International Justice or for the filling of vacancies.

3. That the United States will pay a fair share of the expenses of the Court as determined and appropriated from time to time by the Congress of the United States.

4. That the United States may at any time withdraw its adherence to the said protocol and that the Statute for the Permanent Court of International Justice adjoined to the protocol shall not be amended without the consent of the United States.

5. That the Court shall not render any advisory opinion except publicly after due notice to all states adhering to the Court and to all interested states and after public hearing or opportunity for hearing given to any state, concerned; nor shall it, without the consent of the

¹ Senate Document No. 45, 69th Congress, 1st Session.

United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.

The signature of the United States to the said protocol shall not be affixed until the powers signatory to such protocol shall have indicated, through an exchange of notes, their acceptance of the foregoing reservations and understandings as a part and a condition of adherence by the United States to the said protocol.

Resolved further, As a part of this act of ratification that the United States approve the protocol and Statute hereinabove mentioned, with the understanding that recourse to the Permanent Court of International Justice for the settlement of differences between the United States and any other state or states can be had only by agreement thereto through general or special treaties concluded between the parties in dispute; and

Resolved further, That adherence to the said protocol and Statute hereby approved shall not be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign state; nor shall adherence to the said protocol and Statute be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions.

Agreed to, January 16 (calendar day, January 27), 1926.

Attest:

EDWIN P. THAYER,
Secretary

LETTER FROM THE SECRETARY OF STATE OF THE UNITED STATES OF AMERICA TO THE SECRETARY-GENERAL OF THE LEAGUE¹

Washington, March 2nd, 1926.

I have the honor to refer to the communication of this Department, dated August 15th, 1921, acknowledging the receipt of a certified copy of the Protocol of Signature relating to the Statute of the Permanent Court of International Justice, and take pleasure in informing you that the Senate of the United States of America, on January 27th, 1926, gave its advice and consent to the adherence on the part of the United States to the Protocol of Signature of the Statute for the Permanent Court of International Justice, dated December 16th, 1920, and the adjoined Statute for the Permanent Court of International Justice, without accepting or agreeing to the Optional Clause for Compulsory Jurisdiction contained in the said Statute, on the condition of the acceptance by the Powers signatory to the Protocol of the conditions, reservations and understandings contained in the Senate resolution, which reads as follows:

¹ Reprinted from Minutes of the Committee of Jurists, Geneva, March 11-19, 1929, to which the letter is appended as Annex 3.

[Here follows the text of the Senate resolution, for which see *supra*, p. 262.]

I have the honor, therefore, to inform you that the signature of the United States will not be affixed to the said Protocol until the Governments of the Powers signatory thereto shall have signified in writing to the Government of the United States their acceptance of the foregoing conditions, reservations and understandings as a part and a condition to the adherence of the United States to the said Protocol and Statute.

I have addressed a communication to the representative of each of the Governments of the Powers signatories of the Protocol asking these several Governments to be good enough to ascertain and to inform me in writing whether they will accept the conditions, reservations and understandings contained in the resolution as a part and condition of the adherence of the United States to the said Protocol and Statute.

(Signed) FRANK B. KELLOGG.

CONFERENCE OF STATES SIGNATORIES OF THE PROTOCOL OF SIGNATURE OF THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE¹

FINAL ACT

1. The Conference of States signatories of the Protocol of Signature of the Statute of the Permanent Court of International Justice (Protocol of December 16th, 1920) met at the International Labour Office in Geneva on September 1st, 1926.

2. The occasion of this Conference was the letter of March 2nd, 1926, by which the Secretary of State of the United States of America informed the Secretary-General of the League of Nations that the United States was disposed to adhere to the Protocol of Signature of December 16th, 1920, on condition that each of the States signatories of the said Protocol should previously accept five reservations and conditions as follows:

"I. That such adherence shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the Treaty of Versailles.

"II. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other States, Members, respectively, of the Council and Assembly of the League of Nations, in any and all proceedings of either the Council or the Assembly for the election of judges or deputy-judges of the Permanent Court of International Justice or for the filling of vacancies.

¹ Reprinted from the Minutes of the Committee of Jurists, Geneva, March 11-19, 1929, to which the Final Act and Preliminary Draft of a Protocol are appended as Annex 4. The documents were also printed in Publications of the League of Nations, V. Legal Questions 1926. V. 24.

"III. That the United States will pay a fair share of the expenses of the Court as determined and appropriated from time to time by the Congress of the United States.

"IV. That the United States may at any time withdraw its adherence to the said Protocol and that the Statute for the Permanent Court of International Justice adjoined to the Protocol shall not be amended without the consent of the United States.

"V. That the Court shall not render any advisory opinion except publicly after due notice to all States adhering to the Court and to all interested States and after public hearing or opportunity for hearing given to any State concerned; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest."

This letter gave rise to the resolution of the Council of the League of Nations, of March 18th, 1926, suggesting that a Conference of the delegates of the States signatories of the Protocol should be convened at Geneva, in which the Government of the United States was also invited to participate. The Conference was charged with the task of studying the way in which the Governments of the signatories of the Protocol above mentioned might satisfy the five reservations and conditions proposed by the Government of the United States of America.

3. The Government of the United States, for the reasons set forth in a letter of April 17th, 1926, addressed by the Secretary of State of the United States to the Secretary-General of the League of Nations, declined the invitation to take part in the Conference. The signatory States enumerated below designated as their delegates to the Conference:

[Here follows the list of Delegates]

In the course of its first meeting on September 1st, 1926, the Conference elected as President, Jonkheer W. J. M. VAN EYSINGA, delegate of the Netherlands, and as Vice-Presidents, His Excellency M. César ZUMETA, delegate of Venezuela, and the Right Honourable Sir Francis Henry Dillon BELL, delegate of New Zealand.

4. In the course of its sessions, continued from September 1st, 1926, to September 23rd, 1926, the delegates named above, while regretting that they have not had the assistance of a representative of the Government of the United States, have studied the reservations and conditions of the United States with a strong desire to satisfy them in the largest possible measure. The Conference has unanimously welcomed the proposal of the United States to collaborate in the maintenance of the Permanent Court of International Justice; such collaboration has been awaited with confidence by the States which have accepted the Statute of the Court. The Conference has taken full account of the great moral effect which the participation of the United States in the maintenance of this institution of peace and justice would have on the development of international law and on the progressive

organisation of world society on the basis of a respect for law and the solidarity of nations. Nor has it been unmindful of the valuable American contributions to the progress of international justice in the course of the 19th and 20th centuries, notably in the fruitful participation of the delegates of the United States in the two Hague Peace Conferences and more recently in the large part taken by an eminent American jurist in the preparation of the Statute of the Court.

5. The Conference has recognised that adherence to the Protocol of Signature of December 16th, 1920, by the United States under special conditions necessitates an agreement between the United States and the signatories of the Protocol.

6. The Conference has formulated the following conclusions as the basis of the replies to the letter addressed by the Secretary of State of the United States to each of the States signatories of the Protocol of December 16th, 1920, by which the signatory States would declare their views as to the acceptance of the reservations and conditions proposed by the United States:

Reservation I

It may be agreed that the adherence of the United States to the Protocol of December 16th, 1920, and the Statute of the Permanent Court of International Justice annexed thereto shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the Treaty of Peace of Versailles of June 28th, 1919.

Reservation II

It may be agreed that the United States may participate, through representatives designated for the purpose and upon an equality with the other States, Members of the League of Nations, represented in the Council or in the Assembly, in any and all proceedings of either the Council or the Assembly for the election of judges or deputy-judges of the Permanent Court of International Justice, or for the filling of vacancies.

Reservation III

It may be agreed that the United States pay a fair share of the expenses of the Court as determined and appropriated from time to time by the Congress of the United States.

Reservation IV

A. It may be agreed that the United States may at any time withdraw its adherence to the Protocol of December 16th, 1920.

In order to assure equality of treatment, it seems natural that the signatory States, acting together and by not less than a majority of two-thirds, should possess the corresponding right to withdraw their acceptance of the special conditions attached by the United States to its adherence to the said Protocol in the second part of the fourth reservation and in the fifth reservation. In this way the *status quo ante* could be

re-established if it were found that the arrangement agreed upon was not yielding satisfactory results.

It is to be hoped, nevertheless, that no such withdrawal will be made without an attempt by a previous exchange of views to solve any difficulties which may arise.

B. It may be agreed that the Statute of the Permanent Court of International Justice annexed to the Protocol of December 16th, 1920, shall not be amended without the consent of the United States.

Reservation V

A. In the matter of advisory opinions, and in the first place as regards the first part of the fifth reservation, the Government of the United States will, no doubt, have become aware, since the despatch of its letters to the various Governments, of the provisions of Articles 73 and 74 of the Rules of Court as amended by the Court on July 31st, 1926. It is believed that these provisions are such as to give satisfaction to the United States, having been made by the Court in exercise of its powers under Article 30 of its Statute. Moreover, the signatory States might study with the United States the possible incorporation of certain stipulations of principle on this subject in a protocol of execution such as is set forth hereafter, notably as regards the rendering of advisory opinions in public.

B. The second part of the fifth reservation makes it convenient to distinguish between advisory opinions asked for in the case of a dispute to which the United States is a party and that of advisory opinions asked for in the case of a dispute to which the United States is not a party but in which it claims an interest, or in the case of a question, other than a dispute, in which the United States claims an interest.

As regards disputes to which the United States is a party, it seems sufficient to refer to the jurisprudence of the Court, which has already had occasion to pronounce upon the matter of disputes between a Member of the League of Nations and a State not belonging to the League. This jurisprudence, as formulated in Advisory Opinion No. 5 (Eastern Carelia), given on July 23rd, 1923, seems to meet the desire of the United States.

As regards disputes to which the United States is not a party but in which it claims an interest, and as regards questions, other than disputes, in which the United States claims an interest, the Conference understands the object of the United States to be to assure to itself a position of equality with States represented either on the Council or in the Assembly of the League of Nations. This principle should be agreed to. But the fifth reservation appears to rest upon the presumption that the adoption of a request for an advisory opinion by the Council or Assembly requires a unanimous vote. No such resumption, however, has so far been established. It is therefore impossible to say with certainty whether in some cases, or possibly in all cases, a decision by a majority is not sufficient. In any event the United States should be guaranteed a position of equality in this respect; that is to say, in any case where a State represented on the Council or in the Assembly would possess the right of preventing, by opposition in either of these bodies, the adoption of a proposal to request an advisory opinion from the Court, the United States should enjoy an equivalent right.

Great importance is attached by the Members of the League of Nations to the value of the advisory opinions which the Court may give as provided for in the Covenant. The Conference is confident that the Government of the United States entertains no desire to diminish the value of such opinions in connection with the functioning of the League of Nations. Yet the terms employed in the fifth reservation are of such a nature as to lend themselves to a possible interpretation which might have that effect. The Members of the League of Nations would exercise their rights in the Council and in the Assembly with full knowledge of the details of the situation which has necessitated a request for an advisory opinion, as well as with full appreciation of the responsibilities which a failure to reach a solution would involve for them under the Covenant of the League of Nations. A State which is exempt from the obligations and responsibilities of the Covenant would occupy a different position. It is for this reason that the procedure to be followed by a non-member State in connection with requests for advisory opinions is a matter of importance and in consequence it is desirable that the matter in which the consent provided for in the second part of the fifth reservation will be given should form the object of a supplementary agreement which would ensure that the peaceful settlement of future differences between Members of the League of Nations would not be made more difficult.

The Conference ventures to anticipate that the above conclusions will meet with acceptance by the United States. It observes that the application of some of the reservations of the United States would involve the conclusion of an appropriate agreement between the United States and the other States signatories of the Protocol of December 16th, 1920, as was indeed envisaged by the Secretary of State of the United States in his reply to the Secretary-General of the League of Nations dated April 17th, 1926. To this end, it is desirable that the States signatories of the Protocol of December 16th, 1920, should conclude with the United States a protocol of execution which, subject to such further exchange of views as the Government of the United States may think useful, might be in the form set out below.

PRELIMINARY DRAFT OF A PROTOCOL

The States signatories of the Protocol of Signature of the Permanent Court of International Justice, dated December 16th, 1920, and the United States of America, through the undersigned duly authorised representatives, have agreed upon the following provisions regarding the adherence by the United States of America to the said Protocol, subject to the five reservations formulated by the United States.

Article 1

The United States shall be admitted to participate, through representatives designated for the purpose and upon an equality with the signatory States, Members of the League of Nations, represented in the Council or in the Assembly, in any and all proceedings of either the Council or the Assembly for the election of judges or deputy-judges of the Permanent Court of International Justice, provided for in the Statute of the Court. The vote of the United States shall be counted in determining the absolute majority of votes required by the Statute.

Article 2

No amendment of the Statute annexed to the Protocol of December 16th, 1920, may be made without the consent of all the Contracting States.

Article 3

The Court shall render advisory opinions in public session.

Article 4

The manner in which the consent provided for in the second part of the fifth reservation is to be given, will be the subject of an understanding to be reached by the Government of the United States with the Council of the League of Nations.

The States signatories of the Protocol of December 16th, 1920, will be informed as soon as the understanding contemplated by the preceding paragraph has been reached.

Should the United States offer objection to an advisory opinion being given by the Court, at the request of the Council or the Assembly, concerning a dispute to which the United States is not a party or concerning a question other than a dispute between States, the Court will attribute to such objection the same force and effect as attaches to a vote against asking for the opinion given by a Member of the League of Nations either in the Assembly or in the Council.

Article 5

Subject to the provisions of Article 7 below, the provisions of the present Protocol shall have the same force and effect as the provisions of the Statute annexed to the Protocol of December 16th, 1920.

Article 6

The present Protocol shall be ratified. Each State shall forward the instrument of ratification to the Secretary-General of the League of Nations, who shall inform all the other signatory States. The instruments of ratification shall be deposited in the archives of the Secretariat of the League of Nations.

The present Protocol shall come into force as soon as all the States which have ratified the Protocol of December 16th, 1920, including the United States, have deposited their ratifications.

Article 7

The United States may at any time notify the Secretary-General of the League of Nations that it withdraws its adherence to the Protocol of December 16th, 1920. The Secretary-General shall immediately communicate this notification to all the other States signatories of the Protocol.

In such case the present Protocol shall cease to be in force as from the receipt by the Secretary-General of the notification by the United States.

On their part, each of the Contracting States may at any time notify the Secretary-General of the League of Nations that it desires to withdraw its acceptance of the special conditions attached by the United States to its adherence to the Protocol of December 16th, 1920,

in the second part of its fourth reservation and in its fifth reservation. The Secretary-General shall immediately give communication of this notification to each of the States signatories of the present Protocol. The present Protocol shall be considered as ceasing to be in force if and when, within one year from the receipt of the said notification, not less than two-thirds of the Contracting States other than the United States shall have notified the Secretary-General of the League of Nations that they desire to withdraw the above-mentioned acceptance.

Article 8

The present Protocol shall remain open for signature by any State which may in the future sign the Protocol of Signature of December 16th, 1920.

DONE at, the day of, 19..., in a single copy, of which the French and English texts shall both be authoritative.

7. The Conference recommends to all the States signatories of the Protocol of December 16th, 1920, that they should adopt the above conclusions and despatch their replies as soon as possible. It directs its President to transmit to the Governments of the said States a draft letter of reply to the Secretary of State of the United States.

In faith of which the Delegates have signed the present Act.

DONE at Geneva, the twenty-third day of September nineteen hundred and twenty-six, in a single copy, of which the French and English texts shall both be authoritative, and which shall remain deposited in the archives of the League of Nations. A certified copy shall be sent to each of the States signatories of the Protocol of December 16th, 1920, as well as to the Council of the League of Nations, which convoked the Conference.

NOTE

REGARDING THE APPOINTMENT AND COMPOSITION OF THE COMMITTEE OF JURISTS¹

The circumstances in which the Committee has been appointed appear from the report of M. Scialoja, adopted by the Council on December 13th, 1928, the terms of which were as follows:

"On September 20th, 1928, the Assembly of the League of Nations adopted the following resolution:

"The Assembly,

"Considering the ever-increasing number of matters referred to the Permanent Court of International Justice:

"Deeming it advisable that, before the renewal of the term of office of the members of the Court in 1930, the present provisions of the Statute of the Court should be examined with a view to the introduction of any amendments which experience may show to be necessary;

¹ Annex 1 to the Minutes of the Committee of Jurists, Geneva, March 11-19, 1929.

"Draws the Council's attention to the advisability of proceeding, before the renewal of the term of office of the members of the Permanent Court of International Justice, to the examination of the Statute of the Court with a view to the introduction of such amendments as may be judged desirable and to submitting the necessary proposals to the next ordinary session of the Assembly."

"In order to enable it to formulate the proposals to be submitted by it to the Assembly in accordance with the above resolution, it would seem that the Council might with advantage appoint a small Committee of Jurists to make a preliminary study of the subject."

"Having regard to the terms of the Assembly's decision, the Committee should have wide terms of reference; namely, to report what amendments appear desirable in the various provisions of the Court's Statute."

"The Committee would, of course, be competent to examine such suggestions as may reach it during its work from authoritative sources. Further, it would fall to the Committee to ascertain the opinion of the Permanent Court of International Justice in respect of the working of the Court."

"If the preceding suggestions are accepted by my colleagues, I will venture at a subsequent meeting to submit to them a resolution which will deal also with the composition of the Committee which I propose."

The Council accepted the suggestion that the Rapporteur should submit a draft resolution on this question at a later meeting.

At a subsequent meeting, on December 14th, the Council adopted the following resolution:

"Referring to the report of the representative of Italy adopted on December 13th, 1928, the Council entrusts the study contemplated by this report to a Committee to be composed as follows: M. FROMAGEOT, M. GAUS, Sir Cecil HURST, M. ITO, M. POLITIS, M. RAESTAD, M. RUNDSTEIN, M. SCIALOJA, M. URRUTIA, Jonkheer VAN EYSINGA."

"The Committee will, in addition to the above members, contain a jurist of the United States of America, to be appointed by the President of the Council and the Rapporteur."

"The Council further invites the President and Vice-President of the Court, M. ANZILOTTI and M. HUBER, to participate in the work of the Committee."

"If unable to attend, a member of the Committee may appoint a substitute to take his place."

"The Council further decides that, up to the amount of 30,000 francs, the expenses occasioned by the work of the Committee shall be charged to Item 3, Chapter I, of the budget: 'Unforeseen expenditure (subject to a special decision of the Council)'."

As a result of the above resolution, Mr. Elihu Root has accepted membership of the Committee. The invitation addressed to M. Anzilotti and M. Huber by the Council was accepted by them. The Chairman of the Supervisory Commission has also been asked on behalf of the Council and has agreed to give his assistance in the work of the Committee.

By a resolution of March 9th, 1929, the Council appointed M. Massimo Pilotti as a member of this Committee.

* * *

In addition, the Council adopted on March 9th, 1929, the following proposal and draft resolution submitted by the representative of the British Empire:

"My Government received a few days ago a note from the Secretary of State of the United States of America relating to the accession of the United States to the Protocol of Signature of the Statute of the Permanent Court of International Justice. I understand that similar notes have been received by the Governments of the other signatories.

"The Secretary of State's communication relates more particularly to the reply made to the communication of 1926 by twenty-four Governments as a result of the Conference which was held at the end of that year at Geneva.

"My Government has observed with satisfaction that the United States Government feels that a further informal exchange of views, such as was contemplated by the Conference, ought to lead to an agreement which would be satisfactory to all parties.

"The Secretary of State's note has reached the Governments at the moment at which the Committee of Jurists appointed under the Council's resolution of December 14th, 1928, is about to commence its study of the question of eventual amendment of the Statute of the Court. The task with which this Committee has been entrusted makes it, in my opinion, possible that it might be able to furnish valuable assistance towards reaching the agreement which is contemplated in the Secretary of State's note, and which I am sure is greatly desired by all the present signatories of the Protocol of Signature of the Court's Statute.

"I venture, therefore, to suggest that the Council should invite the Committee to examine this question and to offer any advice upon it which it feels it can usefully give.

"Resolution

"The Council requests the Committee appointed by its resolution of December 14th, 1928, to consider the present situation as regards accession of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice and to make any suggestions which it feels able to offer with a view to facilitating such accession on conditions satisfactory to all the interests concerned."

LETTER FROM THE GOVERNMENT OF THE UNITED STATES OF AMERICA TO
THE SECRETARY-GENERAL OF THE LEAGUE¹

Washington, February 19th, 1929.

I have the honor to refer to the communication of this Department dated March 2nd, 1926, informing you of the resolution of the Senate of the United States setting forth the conditions and understandings on which this

¹ Annex 2 to the Minutes of the Committee of Jurists, Geneva, March 11-19, 1929.

Government might become a signatory to the Protocol of Signature of the Statute of the Permanent Court of International Justice, and to inform you that I am to-day transmitting to each of the signatories of the Protocol a communication which, after referring to my previous communication on the subject, reads as follows:

"Five Governments unconditionally accepted the Senate reservations and understandings; three indicated that they would accept but have not formally notified my Government of their acceptance; fifteen simply acknowledged the receipt of my Government's note of February 12th, 1926; while twenty-four have communicated to my Government replies as hereinafter indicated.

"At a Conference held in Geneva in September 1926 by a large number of the States signatories to the Protocol of Signature of the Statute of the Permanent Court of International Justice, a Final Act was adopted in which were set forth certain conclusions and recommendations regarding the proposal of the United States, together with a preliminary draft of a Protocol regarding the adherence of the United States, which the Conference recommended that all the signatories of the Protocol of Signature of December 16th, 1920, should adopt in replying to the proposal of the United States. Twenty-four of the Governments adopted the recommendations of the Conference of 1926 and communicated to the Government of the United States in the manner suggested by the Conference. By these replies and the proposed Protocol attached thereto, the first four reservations adopted by the Senate of the United States were accepted. The fifth reservation was not accepted in full, but so much of the first part thereof as required the Court to render advisory opinions in public session was accepted, and the attention of my Government was called to the amended Rules of the Court requiring notice and an opportunity to be heard.

"The second part of the fifth reservation therefore raised the only question on which there is any substantial difference of opinion. That part of the reservation reads as follows:

" . . . Nor shall it (the Court) without the consent of the United States entertain any request for any advisory opinion touching any dispute or question in which the United States has or claims an interest."

"It was observed in the Final Act of the Conference that, as regards disputes to which the United States is a party, the Court had already pronounced upon the matter of disputes between a Member of the League of Nations and a State not a Member, and reference was made to Advisory Opinion No. 5 in the Eastern Carelia case in which the Court held that it would not pass on such a dispute without the consent of the non-Member of the League. The view was expressed that this would meet the desire of the United States.

"As regards disputes to which the United States is not a party but in which it claims an interest, the view was expressed in the Final Act that this part of the fifth reservation rests upon the presumption that the adoption of a request for an advisory opinion by the Council or the Assembly requires a unanimous vote. It was stated that, since this has not been decided to be

the case, it cannot be said with certainty whether in some or all cases a decision by a majority may not be sufficient but that, in any case where a State represented on the Council or in the Assembly would have a right to prevent by opposition in either of these bodies the adoption of a proposal to request an advisory opinion from the Court, the United States should enjoy an equal right. Article 4 of the draft Protocol states that, 'should the United States offer objection to an advisory opinion being given by the Court, at the request of the Council or the Assembly, concerning a dispute to which the United States is not a party or concerning a question other than a dispute between States, the Court will attribute to such objection the same force and effect as attaches to a vote against asking for the opinion given by a Member of the League of Nations either in the Assembly or in the Council,' and that 'the manner in which the consent provided for in the second part of the fifth reservation is to be given' should be the subject of an understanding to be reached by the Government of the United States with the Council of the League of Nations.

"The Government of the United States desires to avoid, in so far as may be possible, any proposal which would interfere with or embarrass the work of the Council of the League of Nations, doubtless often perplexing and difficult, and it would be glad if it could dispose of the subject by a simple acceptance of the suggestions embodied in the Final Act and draft Protocol adopted at Geneva on September 23rd, 1926. There are, however, some elements of uncertainty in the bases of these suggestions which seem to require further discussion. The powers of the Council and its modes of procedure depend upon the Covenant of the League of Nations, which may be amended at any time. The ruling of the Court in the Eastern Carelia case and the Rules of the Court are also subject to change at any time. For these reasons, without further enquiry into the practicability of the suggestions, it appears that the Protocol submitted by the twenty-four Governments in relation to the fifth reservation of the United States Senate would not furnish adequate protection to the United States. It is gratifying to learn from the proceedings of the Conference at Geneva that the considerations inducing the adoption of that part of Reservation 5 giving rise to differences of opinion are appreciated by the Powers participating in that Conference. Possibly the interest of the United States thus attempted to be safeguarded may be fully protected in some other way or by some other formula. The Government of the United States feels that such an informal exchange of views as is contemplated by the twenty-four Governments should, as herein suggested, lead to agreement upon some provision which in unobjectionable form would protect the rights and interests of the United States as an adherent to the Court Statute, and this expectation is strongly supported by the fact that there seems to be but little difference regarding the substance of these rights and interests."

(Signed) FRANK B. KELLOGG.

Committee of Jurists on the Statute of the Permanent Court of International Justice

MINUTES OF THE SESSION HELD AT GENEVA,
MARCH 11-19, 1929¹

COMPOSITION OF THE COMMITTEE

Chairman: M. SCIALOJA.

Vice-Chairman: Jonkheer VAN EYSINGA.

Members: M. FROMAGEOT, M. GAUS, Sir Cecil J. B. HURST, M. ITO, M. PILOTTI, M. POLITIS, M. RAESTAD, Mr. ROOT, M. RUNDSTEIN, M. URRUTIA.

Invited to participate in the work of the Committee:

M. ANZILOTTI, President of the Permanent Court of International Justice,

M. HUBER, Vice-President of the Permanent Court of International Justice,

M. OSUSKY, Chairman of the Supervisory Commission.

¹ Series of League of Nations Publications V. Legal 1929. V. 5. [Official No. C. 166. M. 66. 1929. V.] Portions of the minutes which do not deal with the question of the accession of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice are not reproduced herein. The numbers and headings of the sections omitted are:

2. Participation of the President and Vice-President of the Permanent Court of International Justice in the work of the committee.
3. Publicity of the meetings.
6. Death of Lord Finlay, Member of the Permanent Court of International Justice.
- 10-16. Question of the revision of the Statute of the Permanent Court of International Justice.
17. Procedure for advisory opinions and question of the transfer to the Statute of certain provisions of the rules of court.
18. Appointment of rapporteurs and of a drafting committee.
19. Question of the revision of the Statute of the Permanent Court of International Justice.
20. Departure of the chairman.
21. Question of the revision of the Statute of the Permanent Court of International Justice.
22. Question of the extension of the jurisdiction of the Permanent Court of International Court of Justice as a Court of Appeal.
23. Method of seeking advisory opinions on labour questions from the Permanent Court of International Justice.
24. Interpretation of Articles 73 and 74 of the Rules of Court.
29. Printing of the minutes of the committee.
30. Question of holding a public meeting at the close of the session.
31. Interpretation of the word "Nationality" in Article 31 of the Statute of the Permanent Court of International Justice.
- 32-33. Question of the revision of the Statute of the Permanent Court of International Justice.
34. Death of Lord Phillimore.
35. Close of the session.

Secretary of the Committee:

M. Joseph NISOT, Member of the Legal Section of the Secretariat of the League of Nations.

FIRST MEETING

HELD ON MONDAY, MARCH 11TH, 1929, AT 11 A. M.

Chairman: M. SCIALOJA.

Present: All the members of the Committee.

1. *Opening of the Session by the Secretary-General of the League and Appointment of the Chairman and Vice-Chairman of the Committee.*

The SECRETARY-GENERAL welcomed the members of the Committee and reminded them that their terms of reference included a revision, if necessary, of the Statute of the Permanent Court and, secondly, in conformity with the resolution adopted by the Council on Saturday, March 9th, 1929, the consideration of the present situation and of any suggestions which might be put forward as regarded the accession of the United States of America to the Protocol of Signature of the Statute of the Court (Annex 1).²

The Secretary-General suggested that the Committee should elect its officers.

On the proposal of M. POLITIS and M. FROMAGEOT, supported by M. URRUTIA, M. SCIALOJA was elected Chairman by acclamation.

On the proposal of the CHAIRMAN, Jonkheer VAN EYSINGA was elected Vice-Chairman.

(The Secretary-General withdrew.)

* * * * *

4. *Question of the Accession of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice: Letter from the United States Government and Proposals by Mr. Root.*

The CHAIRMAN, after reading the letter addressed on February 19th, 1929, to the Secretary-General by Mr. Frank B. Kellogg (Annex 2),³ referred to a semi-official note which had been received by the Secretary-General from Mr. Root.

M. POLITIS thought that, although the note was only semi-official, it might form the subject of an exchange of views.

Mr. ROOR said that he gladly accepted this procedure. He proposed that the text of his note, which was, however, of an entirely unofficial character, should be distributed as soon as possible. Meanwhile, he would make the following comments on it.

The note contained suggestions, which he was submitting in his own name, as to the way in which it might perhaps be possible to bring the pro-

² See note regarding the Appointment and Composition of the Committee, reproduced herein, *supra*, p. 270.

³ Reproduced herein, *supra*, p. 272.

visions of the Final Act of the Conference of September 1926—which Conference had been presided over so skilfully by M. van Eysinga—and adopted by the majority of States signatories of the Protocol of the Court, into line with the reservations made by the United States Senate (Annex 3)⁴ in regard to the accession of the United States to the Protocol of the Court. He thought that his suggestions, without injuring any of the parties, might be calculated to satisfy both the desires of the United States Senate, as expressed in the reservations that were known to all the members of the Committee, and at the same time the desires expressed by the 1926 Conference in its Final Act.

The note which he had handed to the Secretary-General contained purely personal suggestions; he thought that they might form the subject of an exchange of views among the parties concerned, and might perhaps further the achievement of the purpose that all members had in mind.

Mr. Root's note for a "Suggested Redraft of Article 4 of the Protocol of 1926"⁵ was then read. The text of the note ran as follows:

"The Court shall not, without the consent of the United States, render an advisory opinion touching any dispute to which the United States is a party.

"The Court shall not, without the consent of the United States, render an advisory opinion touching any dispute to which the United States is not a party but in which it claims an interest or touching any questions other than a dispute in which the United States claims an interest.

"The manner in which shall be made known whether the United States claims an interest and gives or withholds its consent shall be as follows:

"Whenever, in contemplation of a request for an advisory opinion, it seems to them desirable, the Council or Assembly may invite an exchange of views with the United States and such exchange of views shall proceed with all convenient speed.

"Whenever a request for an advisory opinion comes to the Court, the Registrar shall notify the United States thereof, among other States mentioned in the now existing Article 73 of the Rules of Court, stating a reasonable time-limit fixed by the President within which a written statement by the United States concerning the request will be received.

"In case the United States shall, within the time fixed, advise the Court in writing that the request touches a dispute or question in which the United States has an interest and that the United States has not consented to the submission of the question, thereupon all proceedings upon the question shall be stayed to admit of an exchange of views between the United States and the proponents of the request, and such exchange of views shall proceed with all convenient speed.

⁴ *Supra*, p. 262.

⁵ The text of the Final Act of the Conference of 1926, together with the annexed draft protocol, is reproduced herein, *supra*, pp. 264, 268.

"If after such an exchange of views, either while a question is in contemplation or after a question has gone to the Court, it shall appear: (1) that no agreement can be reached as to whether the question does touch an interest of the United States within the true meaning of the second paragraph of this article; and (2) that the submission of the question is still insisted upon after attributing to the objections of the United States the same force and effect as attaches to a vote against asking for the opinion given by a Member of the League of Nations either in the Assembly or in the Council; and if it also appears that the United States has not been able to find the submission of the question so important for the general good as to call upon the United States to forego its objection in that particular instance, leaving the request to be acted upon by the Court without in any way binding the United States; then it shall be deemed that, owing to a material difference of view regarding the proper scope of the practice of requesting advisory opinions, the arrangement now agreed upon is not yielding satisfactory results and that the exercise of the powers of withdrawal provided in Article 7 hereof will follow naturally without any imputation of unfriendliness or of unwillingness to co-operate generally for peace and goodwill."

The CHAIRMAN, speaking in his capacity as President of the Council, said that the Council would be glad if the Committee could discover the means of satisfying the desiderata of the United States Government as expressed in Mr. Kellogg's letter, whilst safeguarding the dignity of the League.

Jonkheer VAN EYSINGA, without wishing to examine in detail Mr. Root's note, which he had not yet been able to study, desired to express the deep gratification which Mr. Kellogg's letter had caused him. He had observed, too, with keen pleasure the satisfaction felt by the Council at the presence on the Committee of Jurists of that eminent statesman and lawyer, Mr. Elihu Root.

When the question had come up before the last session of the Assembly, it had been thought that it would be desirable merely to consider whether there might not be certain modifications or *retouches* to be made in the Statute of the Court. Now, M. van Eysinga was under the impression that Mr. Kellogg's letter greatly extended the scope of the work assigned to the Committee. At the 1926 Conference, only the second part of the fifth reservation made by the United States had caused any difficulties. It seemed that the time spent in waiting had not been lost, and Mr. Root's note appeared to indicate a possible way out of the present difficulties. Personally, M. van Eysinga expressed the sincere hope that the United States would accede to the Statute of the Permanent Court.

M. POLITIS too thought that Mr. Root's note contained certain very valuable suggestions which would make it possible perhaps to reach a satisfactory solution, but he could not at the moment give more than his simple impression, since he had not yet had time to study the document.

Sir Cecil HURST having suggested that the meeting should be adjourned in order to enable the jurists to examine the personal suggestions made by Mr. Root, the CHAIRMAN, said that, in his opinion, the Committee was in a position at once to examine various questions which were bound up with Mr. Kellogg's letter. That letter emphasised two difficulties, which it would, he thought, be easy to surmount. In the first place, there was the possibility of a modification to be made later in the Covenant. In the second place, was it possible to give an assurance to the United States that, in other cases, the Permanent Court would not follow any practice other than that which it had followed in the Eastern Karelian affair? If these two difficulties could not be overcome, it did not appear likely that any conclusion acceptable to the United States would be reached. The Chairman, however, thought that this was not the case.

M. PILOTTI, after referring to the two difficulties pointed out by the Chairman, thought that the second might be overcome if the Committee decided to suggest to the signatory States certain amendments in the Statute of the Permanent Court. From the award given in the Eastern Karelian case it would be possible to infer a principle which might be introduced into the Statute. In this way the United States would receive satisfaction, since the practice of the Permanent Court could not be modified further once the future Conference of signatory States had accepted that proposal.

The first difficulty was more serious, since it was obvious that the Covenant could be amended by the Members of the League. The United States, however, was not a Member. The point would have to be considered whether, in concluding an arrangement with the United States with a view to its accession to the Permanent Court, it would not be possible to make such an arrangement contingent upon the condition that the article of the Covenant relating to advisory opinions would not be amended. The result would be, in practice, that, if a proposal for amendment were made to the Assembly at some future date, the arrangement would lapse; but no such proposal would probably ever be made to the Assembly, which had frequently manifested its wish that the United States should become and remain an adherent to the Statute of the Court.

There was another difficulty, one that was implicit in Mr. Kellogg's observations. If Mr. Kellogg's letter were to be interpreted in the sense that the United States was only asking that the Covenant should not be amended, its wishes could be met by making the arrangement with that country contingent on the condition that the Covenant should remain intact; but if the letter meant that the United States held unanimity to be necessary in regard to advisory opinions, a question which was still open, it would not be easy to find a way out of the difficulty.

M. Pilotti contemplated the adoption of the following system:

"The third paragraph of Article 4 of the draft Protocol approved by the 1926 Conference to be replaced by the two following paragraphs:

"3. *The Court will not give advisory opinions concerning a dispute to which the United States is a party unless the United States has consented to such a course.*

"4. Should the United States offer objection to an advisory opinion being given by the Court at the request of the Council or the Assembly concerning a dispute to which the United States is not a party or concerning a question other than a dispute between States,

(First Alternative)

" . . . the Court

will attribute to such objection the same force and effect as, according to the provisions of the Covenant of the League of Nations, these provisions are operative on the date of the signature of the present Protocol by the United States, attaches to a vote by a Member of the League of Nations either in the Assembly or in the Council against asking for an opinion."

(Second Alternative)

" . . . the Court

shall take a decision regarding this objection. If the Court agrees that the United States has an interest in the dispute or question, it will declare that the advisory opinion should not be given without the consent of the United States."

Sir Cecil Hurst thought that it would not be very difficult to find means of giving satisfaction to the United States on the three points. If his memory was correct, these difficulties had already been considered at the 1926 Conference, but it was possible that they were not very clearly stated in the records of the Conference. In Article 2 of the preliminary draft of the Protocol, it was stated that "no amendment of the Statute annexed to the Protocol of December 16th, 1920, may be made without the consent of all the Contracting States."

Secondly, in regard to the objection derived from a possible change in the practice of the Court, some people had thought that it would be well to insert in the Statute a provision based on the rule which had been adopted in the Eastern Karelian case. Other members of the Conference had considered that it would be inadvisable to bind the Permanent Court by introducing into the Statute itself the procedure which it had followed in a particular case. Sir Cecil Hurst thought he was right in stating also that, in the view of the Conference, the provisions appearing in Article 7 of the preliminary draft of the Protocol, under which the United States might at any time notify the Secretary-General that it withdrew its adherence to the Protocol of December 16th, 1920, might be considered as satisfactory. There would thus be conferred on the United States a right not possessed by the Members of the League.

Sir Cecil Hurst thought that the three objections which emerged from Mr. Kellogg's letter might be met satisfactorily by the introduction into the Protocol of an amendment according to the United States in very clear

terms the right to withdraw, on the basis of the provisions of Article 7, if any change were made either in the Covenant, or in the Rules or practice of the Court, and he proposed to insert an additional provision in the preliminary draft of the Protocol on the following lines:

"In the event of any modification being made in the Covenant of the League of Nations or in the Rules of the Court or in the practice of the Court which is calculated to prejudice the protection of the United States of America against demands for advisory opinions in cases in which the United States is interested, the Parties recognise the right of the United States to withdraw under Article 7 of the present Protocol."

Jonkheer VAN EYSINGA believed that Mr. Root's suggestions were intended precisely to overcome the difficulties in question, but he thought it better not to continue the discussion on this subject until all the members of the Committee had had an opportunity of examining Mr. Root's note more closely.

The CHAIRMAN said that, before suspending the discussion, it would be well to ascertain whether there were not other difficulties to be foreseen, so that the Committee might hold its later discussions with a full knowledge of all the facts.

Mr. Root explained that his suggestions covered the most serious difficulty, namely, the second part of the fifth reservation of the United States. He had attempted to solve this difficulty in the spirit of the Final Act of 1926, and on the basis of Article 4 of the preliminary draft of the Protocol. His suggestion should be read with the actual text of the Final Act in mind. According to the general opinion of the members of the 1926 Conference, the chief difficulty resulting from the second part of the fifth reservation of the United States was due to the way in which that reservation had been drafted. Its terms were so general that they seemed to afford powers of general interference in the business of the Council and of the Assembly in regard to advisory opinions. What was required in order to reach the agreement proposed in the first paragraph of Article 4 of the preliminary draft of the Protocol? The scope of this possible interference must be determined. The theoretical question raised by the second part of the fifth reservation could be discussed forever and without any positive result. In his note, Mr. Root had tried to solve the difficulty in a practical way and to determine the scope of the United States' reservation.

Mr. Root added that his note bore only on the second part of the fifth reservation of the United States, and left entirely open the question dealt with in Sir Cecil Hurst's proposal or any other proposal that might be put forward.

5. *Procedure for obtaining Advisory Opinions from the Permanent Court of International Justice.*

M. POLITIS thought that the discussion would very largely bear on the

procedure under which requests for advisory opinions were made. On this subject there were no rules, but it appeared that a certain practice had been established. The question had been discussed repeatedly and once again last September, but it was still open.

The CHAIRMAN thought he could sum up as follows the present position of the question. Was unanimity necessary or did a majority suffice for a request for an advisory opinion? Up to the present, neither the Council nor the Assembly had been able to come to a decision, with the result that, in practice, advisory opinions were not asked for. On the last occasion on which there had been ground for asking for an advisory opinion, the request had not been made, so that it might not be necessary to solve this question.

Personally, the Chairman had always held the view that advisory opinions fell within the class of acts which, according to the Covenant, could be effected by a majority vote, but he realised that that opinion was not in conformity with practice. The Permanent Court held that its opinions were binding on the parties which had asked for them. Consequently, its opinions settled the question, and an act of that kind was one of those which, under the terms of the Covenant, should be effected by a unanimous vote.

In view of the fact that the absence of any rule had the effect that no request was made for an advisory opinion, the Chairman, while adhering to his first opinion, thought that if in this case the rule of the majority vote was calculated to prevent the recourse to advisory opinions, it would be better to establish the rule of unanimity. Instead of consulting the Permanent Court, the Council had made it a habit to consult groups of jurists, since it thus remained free not to follow their opinion if it thought fit. That procedure had on several occasions been substituted for that of asking for an advisory opinion from the Permanent Court. If the Council continued to follow that method in all cases in which it did not wish to be bound by an opinion, and if it consulted the Permanent Court only when it wished to be bound by such opinion as the Court might put forward, the question would fall to the ground and there would be no obstacle to the adoption of a system which would permit of the accession of the United States to the Court.

SECOND MEETING

HELD ON MONDAY, MARCH 11TH, 1929, AT 5 P. M.

Chairman: M. SCIALOJA.

Present: All the members of the Committee.

* * * * *

7. *Question of the Accession of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice: Letter from the United States Government and Proposals by Mr. Elihu Root (continuation).*

M. GAUS said he was not sure that he fully understood the procedure

suggested by the Chairman at the morning meeting. The Chairman had suggested that the Committee should consider the three points contained in the letter from Mr. Kellogg. The Committee, however, was also considering proposals of Mr. Root. Was it not a fact that Mr. Root's proposals covered the whole question under discussion and incidentally the three points in Mr. Kellogg's letter? Was it therefore necessary to take the three points contained in that letter separately? Mr. Root's proposals went to the heart of the problem.

The CHAIRMAN said that the Committee had before it an official document, namely, the letter from Mr. Kellogg, to which the Council was bound to reply, and the Council desired the advice of the Committee upon the answer to be made. The Committee had also before it proposals made by Mr. Root in his private capacity. Those proposals were extremely important but they were not official proposals. It was true that the Committee might report to the Council on the basis of Mr. Root's proposals, but, it would nevertheless, in his opinion, be necessary to reply to the Council separately on the three points to which he had referred.

He would point out, moreover, that, though the Committee might report to the Council on the basis of Mr. Root's proposals, the Council might not be disposed to accept them. The Council could not, however, omit to reply to the points raised by Mr. Kellogg. The Committee should therefore express its views separately on the three points, even though it considered that those points were covered by other proposals which had been presented.

M. GAUS said that he was not yet entirely convinced. The three points contained in Mr. Kellogg's letter were only of importance with reference to the fifth reservation contained in the memorandum of the United States. That memorandum was in fact a criticism of the findings of the Conference of 1926, and the Committee would have to find some way of meeting that criticism. Mr. Root's proposals went directly to the heart of the problem and, if accepted, would cover the whole ground.

The CHAIRMAN again pointed out that, though the Committee might accept the proposals of Mr. Root, the Council might not be ready to do so and would in that case be unable to reply to the letter of Mr. Kellogg upon the advice of the Committee.

Mr. Root said that he had no authority to interpret the letter from Mr. Kellogg, but he thought that he understood what that letter implied. Mr. Kellogg was unable to accept in its entirety the Protocol of 1926 and had in his letter given a number of reasons, by way of illustration, why the United States was unable to do so. One of the reasons was that the procedure followed in asking the Permanent Court for an advisory opinion might not be satisfactory to the United States. The Court had, in the Revised Rules of 1926, met the views of the United States, as expressed in the first part of the fifth reservation, by undertaking that notice should be given of any request for an advisory opinion and that the United States should be given

an opportunity to be heard. Mr. Kellogg had stated, however, that this arrangement was not a sufficient protection for the interests of the United States as the Rules of the Court were liable to amendment at any time and the guarantee was not therefore permanent. The Covenant of the League itself, which regulated the powers of the Council to request an advisory opinion, might be altered, and the United States would have no opportunity of expressing its views upon any amendments which might be proposed. The guarantees laid down in the Final Act of 1926 were therefore uncertain and this made it impossible for the United States to accept them.

Mr. Kellogg had therefore proposed, in conclusion, that the interests of the United States might be safeguarded in some other way and had suggested that there might be an informal exchange of views which would lead to agreement upon some provision which, in an unobjectionable form, would protect the rights and interests of the United States as an adherent to the Court Statute. Mr. Kellogg had pointed out that such an expectation was strongly supported by the fact that there seemed to be but little difference regarding the substance of the rights and interests involved.

The uncertainty as to the permanence of the guarantees contained in the Protocol of 1926 was a problem which stood by itself and would have to be solved. It had been suggested by Sir Cecil Hurst that any modification in the Rules of Procedure of the Court or in the powers of the Council and the Assembly to the detriment of the United States should be regarded as a suitable ground for withdrawal. Such a suggestion might meet the objections expressed by Mr. Kellogg.

A further point remained, however, which was defined in the fifth reservation and dealt with in Mr. Root's own proposals. He was referring to the reservation in regard to the exercise and scope of the powers of the Council in requesting an advisory opinion. The Council might decide to request an advisory opinion without reference to the interests of the United States which might in certain cases be involved. This reservation was due to apprehensions in respect of possible infringement upon the rights and interests of the United States.

He had also in his proposals endeavoured to meet apprehensions of another kind, namely, that the reservation of the United States might be used to interfere with the Council or the Assembly in the discharge of its duties and to embarrass its procedure. There was no intention on the part of the United States to hamper the procedure of requesting advisory opinions upon unreal and unsubstantial grounds. It was difficult in an abstract formula to discriminate between the multitude of possible interests involved, and he had endeavoured in his proposals to allay apprehensions on both sides by dealing with the problem in a concrete form.

He had since been shown an alternative draft which, so far as he could see, fulfilled exactly the same purpose as his own. The essential point was that the United States should be promptly informed of the intentions of the

Council in dealing with any matter in which the former might be interested, and that there should be some kind of informal conference in regard to any concrete case which might arise. Such a solution would make it possible to avoid discussing detailed questions of procedure, such as whether decisions to request an advisory opinion should be taken unanimously or by a majority vote. These proposals were inspired by a strong desire on the part of the United States to avoid interfering, in any way, with the procedure of the Council. The case might never arise for a full application of his proposal, which was intended to provide against a very rare and improbable contingency.

Jonkheer VAN EYSINGA thought that the general question raised in the letter of Mr. Kellogg had been met by the proposals of Mr. Root. Mr. Kellogg had stated that the Government of the United States desired to avoid as far as possible any proposal which would interfere with or embarrass the work of the Council of the League. Another merit of the proposals of Mr. Root was that they avoided going into the details of the internal constitutional law of the League. The problem had become a concrete one and the general and abstract question whether the Council should take its decisions unanimously or by a majority vote was avoided.

He agreed with the Chairman that it would be necessary for the Committee to consider separately the letter of Mr. Kellogg, but he thought that the best method would be to take the proposals of Mr. Root, which might be regarded as a concrete development of that letter.

He had two observations to make on the text of Mr. Root's proposals. There was a reference in the second paragraph to the second half of the fifth reservation. Was it not desirable, in referring to the fifth reservation, to quote it *ipsis verbis*, instead of giving a paraphrase?

Secondly, would it not be possible to simplify the procedure defined in the fifth paragraph? A question might come before the Council regarding which the Council might desire to have an advisory opinion from the Court. Under the proposed procedure the Council might either discuss the question with the United States or, in urgent cases, ask the Court at once for an advisory opinion. The Court would then inform the United States, under Article 73 of the Rules of the Court, that it had been seized of the question; the United States might then reply to the Court that it had objections to raise. This reply would go to Geneva by way of The Hague and be discussed by the Council. The letters would thus pass from Geneva to The Hague, from The Hague to Washington, from Washington to The Hague and from The Hague to Geneva. Would it not be simpler to provide that the Council when asking for an opinion from the Court, should at the same time notify the United States of its action, and that the United States should immediately communicate with Geneva?

Sir Cecil HURST said that he was the author of the revised draft to which Mr. Root had referred. On studying Mr. Root's proposal, he had

felt that, without in any way changing its substance, it was possible to render the scheme more acceptable by amending it in form and arrangement. He had not shown this revised draft to anyone but Mr. Root, but with Mr. Root's permission he would now have it distributed to the Committee.

Mr. Root said he would be very glad if the revised draft were circulated. He was not yet prepared to express a final opinion upon it, but was under the impression that it was an improvement upon his own. His own draft had suffered from his anxiety to avoid interfering in any way with the procedure and work of the Council. Sir Cecil Hurst, however, appeared to think that the Council might welcome such intervention, and that his own anxiety on the subject was groundless. He would also observe that the draft of Sir Cecil Hurst met the points which had been raised by M. van Eysinga.

M. RUNDSTEIN wondered whether the reference to the possible withdrawal of the United States made in the last paragraph of Mr. Root's proposal was really necessary. The right to withdraw from the Court belonged to every State, and it was perhaps superfluous to refer to it. The reference to withdrawal appeared to be all the more unnecessary as the United States would not be bound by an advisory opinion with which it had not concurred. Would it not be better simply to say that, if agreement were not reached between the United States and the Council regarding a request for an advisory opinion, that opinion could not be invoked against the United States in its relations with other countries?

M. POLITIS said he did not feel ready to pass a final opinion upon Mr. Root's proposal. He had, however, been greatly impressed by the observation of Mr. Root to the effect that it was a matter of indifference to the United States what procedure was followed by the Council in deciding to ask for an advisory opinion, and that the United States had no desire to discuss the question whether the decision to request such opinions should be taken unanimously or by a majority vote. That was a very important declaration and appeared to open the way to an easy settlement of all the difficulties.

The question of procedure, so far as a non-Member of the League was concerned, was simple. Whenever the Council decided to ask for an advisory opinion, it would have to ask the United States whether it considered that the question to be put before the Court was of interest to it. There would be an exchange of views on the subject. If the United States were not interested, the procedure would go forward in the ordinary way. If the United States, on the contrary, claimed an interest and opposed the request for an advisory opinion, it was open to it to withdraw from the Court and the opinion would not be binding upon it.

M. OSUSKÝ represented that, if the fundamental idea underlying the proposals of Mr. Root were accepted, the procedure would have to be simplified. Under the procedure proposed, an intervention might be necessary after a question had been submitted to the Court, and during the proceedings

before the Court. It was extremely undesirable that there should be any interference with the proceedings of the Court after the Court had actually been requested to act. The procedure would also have to be simplified in order to avoid loss of time.

He would suggest that the best procedure would be for a representative of the United States to be invited to attend the Council whenever the question of asking the Court for an advisory opinion was to be considered.

M. URRUTIA said that, as Sir Cecil Hurst had prepared a revised version of the proposals of Mr. Root, it would be better for the Committee to postpone any further consideration of the matter until the amended version had been distributed.

He would, however, draw attention to one important consideration. As M. Politis had said, the declaration of Mr. Root to the effect that it was a matter of indifference to the United States whether the Council took its decisions unanimously or by a majority vote contributed to simplify the problem. He would point out, however, that if the proposals of Mr. Root were adopted, it would be necessary to obtain the consent of all the Members of the League to that arrangement and to ensure that it safeguarded the principle of equality of all the Members of the League. In order to secure equality as between all Members of the League it would be necessary to adopt the rule of unanimity. Otherwise the United States would have a power of veto for which there would be no equivalent in the rights enjoyed by Members of the League.

He would add, in support of the doctrine of unanimity, that when the Council requested an advisory opinion, it in effect surrendered to the Court its own power of decision, and in his view such a step could only be taken with the unanimous consent of all its Members.

He felt sure that the Committee was on the way to an agreement, and that that agreement would lead inexorably to the adoption of the rule of unanimity in order to secure equality as between all the parties concerned.

The CHAIRMAN again reminded the Committee that it would be necessary to advise the Council as to the reply to be addressed to Mr. Kellogg. The Committee, however, might discuss the question first from the general point of view. What exactly were the guarantees claimed by the United States? The United States desired that the Court should not be asked for an advisory opinion which might be detrimental to its interests. Mr. Root's proposals provided a machinery of guarantees. It had been said that this machinery might be considered quite apart from the question whether a decision of the Council to request an advisory opinion should be taken unanimously or by a majority vote. It had, however, been pointed out that the question of unanimity was in effect involved, owing to the moral and practical results of Mr. Root's proposals.

He would himself point out that if, contrary to the wishes of the United States, the League of Nations requested the Court for an advisory opinion,

the United States would thereupon exercise its right to withdraw from the Court. Such a step, however, was of so serious a character that it must be regarded as a species of sanction. It was to the interest of the Council to retain the participation of the United States in the Court, and the United States could, therefore, by the possibility of its withdrawal, exercise what would, in practice, be a kind of moral pressure on the Council. Moreover, the advantages of the system suggested by Mr. Root would almost certainly be claimed by other States which had not yet adhered to the Court. Russia, for example, would ask for similar treatment. Each time, therefore, that the Council desired to ask the Court for an advisory opinion, it would be necessary to apply a complicated procedure, and to conduct correspondence with the States which had a right to be consulted.

The practical effect of this method would be a tendency to abolish the whole system of advisory opinions. Personally, he would not greatly regret their disappearance. He would point out, however, that the object which the United States desired to secure might be attained much more simply, and without risking any of the complications to which he had referred. The aim of Mr. Root's proposals would be secured if the Council merely decided to apply the rule of unanimity whenever it proposed to request an advisory opinion. If it were laid down that all such requests must be decided by a unanimous vote, the problem at once became extremely simple. It would merely be necessary to provide at the same time that the United States, or any other State non-Member of the League, should have the same rights as the Members of the League in this particular matter. The adoption of such a system would involve no danger of withdrawal from the Court by a dissentient Power.

Unanimity might be difficult to secure but, in any case, requests for advisory opinions were becoming more and more rare. The Council, when confronted with a legal difficulty, preferred an informal consultation of jurists. The procedure of requesting an advisory opinion from the Court was complicated and had serious consequences, since the Court was unable to regard its opinions merely as simple legal opinions, and the expression of such opinions had, therefore, far-reaching effects.

The establishment of the rule of unanimity might be effected by an interpretation of Article 14. It was only necessary to interpret a decision of the Council to mean a decision of all the Members of the Council. If, however, amendment was necessary, such amendment could be effected by the introduction of the word "unanimously" after the word "Council" in Article 14.

An alternative solution would be the total abolition of the advisory opinion. That might seem a somewhat drastic solution and might shock public opinion. The advantage of solving the problem by adopting the rule of unanimity was that it enabled the whole question to be settled within the limits of the Covenant. If that solution, however, were unacceptable, the

Committee might take up Mr. Root's proposals, as had been suggested, with such simplifications as might appear to be necessary.

Mr. Root said he did not wish to express any opinion as to the merits of the rule of unanimity. He would leave that question to other members of the Committee who had more experience of the working of the Council and its procedure.

His own proposal was based on the fact that no decision had been reached on the question of unanimity, and its terms were conditioned by the fact that the United States had no desire to influence the solution of that problem.

He had emphasised that his proposals were intended to cover exceptional and extremely improbable cases. The Protocol of 1926 had gone a long way towards meeting the wishes of the United States. An arrangement whereby the United States could have a vote in cases where it was proposed to request the Court for an advisory opinion might be a satisfactory solution if the character of that vote were determined.

Nearly every point at issue had been settled in 1926. Mr. Kellogg, however, had drawn attention to a few outstanding matters, and, in his opinion, the proposals drafted by Sir Cecil Hurst provided a satisfactory basis for the settlement of these points. Possibly, however, some other way would be found.

Only the last portion of the fifth reservation of the United States remained, and the difficulties to which attention was drawn in that reservation could, in his view, be settled by the process of dealing with concrete cases by means of an informal conference between the parties. On most of the cases which would arise the United States would not have to make any observations. The whole matter would be settled by question and answer between the Council and the representatives of the United States. If, however, any question on which an advisory opinion was desired touched in any way the interests of the United States, the points at issue might be settled in a friendly and normal manner in a friendly conference. There was a process at present developing in Europe for the promotion and maintenance of peace which was somewhat novel in diplomacy. A good deal of business was being taken out of the hands of Foreign Offices and settled by means of informal and friendly conversations between Foreign Ministers. He thought that this was an admirable method of doing business. The United States had not at present adopted that method, but it seemed desirable, in some cases, to endeavour to bring about an adjustment between the two methods. His own proposals were intended in that sense. He desired to see a reasonable procedure adopted in cases where it was necessary to ascertain whether a particular question was of interest to the United States, and he was anxious to avoid impeding international business and the development of friendly relations between States by insisting on questions of form when there might in reality be no question of substance involved.

The continuation of the discussion was postponed to the next meeting.

THIRD MEETING

HELD ON TUESDAY, MARCH 12TH, 1929, AT 10.30 A. M.

Chairman: M. SCIALOJA.

Present: All the members of the Committee.

8. *Question of the Accession of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice: Letter from the United States Government and Proposals by Mr. Root, Sir Cecil Hurst and M. Politis (continuation).*

The CHAIRMAN reminded the members of the Committee that Sir Cecil Hurst had submitted the following proposals for redrafting Article 4 of the Protocol of 1926:

"(1) With a view to ensuring that the Court shall not, without the consent of the United States render an advisory opinion touching any dispute to which the United States is a party or in which it claims an interest, or touching any question other than a dispute in which it claims an interest, the Secretary-General shall inform any representative designated for that purpose by the United States of any proposal for obtaining an advisory opinion from the Court, and thereupon, if desired, an exchange of views between the Council or the Assembly of the League of Nations and the United States shall proceed with all convenient speed.

"(2) In deciding whether or not to request an advisory opinion of the Court in any case covered by the preceding paragraph, the Council or the Assembly will attribute to an objection of the United States the same force and effect as attaches to a vote against asking for the opinion given by a Member of the League in the Council or in the Assembly.

"(3) If, after the exchange of views provided for in paragraph 1, it shall appear that no agreement can be reached as to whether an interest of the United States is affected, and the United States is not prepared to forego its objection, the exercise of the powers of withdrawal provided for in Article 7 will follow naturally without any imputation of unfriendliness or unwillingness to co-operate generally for peace and goodwill.

"(4) Whenever a request for an advisory opinion comes to the Court, the Registrar shall notify the United States thereof among other States mentioned in the now existing Article 73 of the Rules of Court stating a reasonable time limit fixed by the President within which a written statement by the United States concerning the request will be received. If the United States alleges that the question upon which the opinion of the Court is asked is one which affects the interests of the United States and that no information was given to it, in pursuance of paragraph 1, of the intention to seek the opinion of the Court, proceedings shall be stayed for a period sufficient to ensure an exchange of views in accordance with the provisions of paragraphs 1, 2 and 3 of this article."

M. POLITIS informed the Committee that he would ask the Secretariat to distribute a text which he had prepared with the object of simplifying and more clearly defining the text submitted by Sir Cecil Hurst.

M. RAESTAD thought that the Committee could hail as a good omen the Anglo-American collaboration as represented by the Root-Hurst draft. A similar occurrence had taken place in 1926 in connection with the Root-Phillimore draft. If the proposal of Mr. Root were examined, the Committee would note that it showed progress on the situation which existed in 1926, in so far as the following three points were concerned:

1. The United States formally abandoned all interest in the question whether unanimity or a mere majority was required when the Council or the Assembly requested an advisory opinion.

2. The United States would explain its point of view when it claimed that a particular question was of interest to it.

3. In case of disagreement, if the Council or the Assembly maintained its request for an advisory opinion, contrary to the wishes of the United States, the United States would not insist on exercising its right of veto and would withdraw from the Permanent Court.

In opposition to what had been said on the previous day by Mr. Root, M. Raestad did not think that, on two points at any rate, one of which raised a question of principle, the proposal of Sir Cecil Hurst was an improvement on that submitted by his United States colleague. Mr. Root's proposal was divided into two parts:

1. It covered cases when the United States was a party to a dispute. In this connection, there was only one provision—the first—in accordance with which the Permanent Court would not give an advisory opinion without the consent of the United States.

2. It covered the case in which the United States claimed that it had an interest at stake, though it was not a party to a dispute. All the rest of the Root proposals dealt only with cases of this kind.

In the text proposed by Sir Cecil Hurst these two ideas had been combined in one and the same formula. In the first paragraph it was stated: "With a view to ensuring that the Court shall not without the consent of the United States render an advisory opinion touching any dispute to which the United States is a party or in which it claims an interest. . . ." The second paragraph stated: "In deciding whether or not to request an advisory opinion of the Court in any case covered by the preceding paragraph, the Council or the Assembly will attribute to an objection of the United States the same force and effect as attaches to a vote against asking for the opinion given by a Member of the League. . . ." It was not desirable to cover both these cases by the same formula. When the United States was a party to a dispute, according to the legal practice established by the Permanent Court, the Court was not competent, and there was no question of giving to the veto imposed by the United States the same force as a contrary vote by a Member of the Council or the Assembly.

Similarly, paragraphs 3 and 4 of the proposals of Sir Cecil Hurst only covered cases in which the United States claimed an interest, though it was

not a party. On this point, too, the cases should be divided, and a return made to the formula proposed by Mr. Root.

Another change in the text proposed by Mr. Root was also to be found in the proposals of Sir Cecil Hurst. In paragraph 3 of his proposals it was stated: "whether an interest of the United States is affected," while the following phrase was added in the text proposed by Mr. Root: "within the true meaning of the second paragraph of this article" (the new draft of Article 4 of the Protocol of 1926). These words were very useful, for they introduced a distinction between interests which would normally give rise to an objection on the part of the United States and other interests. It could always be admitted that, in a special case, the United States might have a distant and general interest, but the object of the discussions contemplated by Mr. Root and Sir Cecil Hurst would be to know whether such an interest was one which should normally be taken into account.

And now, how should the debates be divided between the Permanent Court on the one hand, and the Council or the Assembly on the other hand? According to the scheme proposed by Mr. Root it would be for the Permanent Court to decide when the parties were divided on the question whether the United States would or would not be a party. In other cases, the whole discussion would take place before the Council or the Assembly. The following supposition, however, might occur. When it had been said that the Permanent Court would not give an advisory opinion if the United States were a party to the dispute, this argument had been based on the decision given in the Eastern Karelian affair. It might, however, be supposed that the Permanent Court, when continuing its work of identifying the procedure for requesting an advisory opinion with legal conflicts, would go further and say that it was incompetent even though a State were not a party to a dispute but only had legal interests at stake. When the procedure for requesting an advisory opinion was being put into operation, a State which was legally interested had not exactly the same right to intervene as that accorded to the contesting parties under Article 62 of the Statute. The only remedy which could be imagined in the case of a request for an advisory opinion would be for the Permanent Court to declare itself incompetent. As a rule, when a case had already been brought before a court, it was always clear who were the parties to the dispute. On the other hand, at what might be called the political stage, before the discussion had taken place before the Courts it might be very difficult and delicate to discover whether a State was a party or not to any particular dispute. If the present text of Sir Cecil Hurst were retained, it might be possible to reach the following strange result: In a particular question the United States might claim to be a party, or to have a legal interest; the Council or the Assembly might not recognise the validity of that claim and the United States would withdraw from the Permanent Court; the Court, after the withdrawal of the United States, would all the same declare itself incompetent.

Two means could be used for remedying this defect. Either a phrase could be added to the first paragraph to the effect that the Court would not give any opinion when the United States was a party to the case, or had a legal interest, or by stating somewhere else that each of the parties would be allowed to submit the question of competence to the Court itself.

Continuing his argument, M. Raestad referred to the question of the procedure to be adopted. Among the Members of the League there were about fifteen that had not ratified the Statute. When an amendment of this kind was being dealt with, it was indispensable carefully to observe the same formalities as were used when the original Statute had been voted. Provision must therefore be made for a resolution of the Assembly. M. Raestad wondered whether it would be possible to transfer to that resolution part of the proposals of Mr. Root and Sir Cecil Hurst. From a legal point of view he was somewhat shocked to think that the States which had signed the Statute should deal with the question in the name of the Council or of the Assembly, as was contemplated in the text proposed by Mr. Root and Sir Cecil Hurst. It was preferable to embody in a resolution of the Assembly the provisions allowing for action by the Council or the Assembly. This would not prevent States signatory to the Statute from undertaking individually, in so far as the United States was concerned, to accept the procedure laid down by the resolution of the Assembly.

Finally, the letter from the International Labour Office (Annex 5) ⁶ led M. Raestad to think that the question of a unanimous or a majority vote should not be dealt with. There were internal questions concerning the League just as there were purely American questions. The best plan would be for the United States to declare in cases which were purely of concern to the League that its right of veto would not be exercised. When such questions were being examined, it would perhaps be preferable to lay down that a majority vote was sufficient. For these reasons, M. Raestad still thought that the question of unanimity or of a majority vote should be left on one side, as had been the case during the Conference of 1926, and as Mr. Root had done.

M. Iro said that, before giving an opinion on the draft of Sir Cecil Hurst, he would like to have an explanation in regard to a small question of procedure dealt with in paragraph 4 of that draft. The fifth paragraph of Mr. Root's text contained a similar proposal which in that document was appropriate, since, in accordance with the fourth paragraph, an exchange of views between the Council or the Assembly and the United States would be entirely optional, a fact which made a provision such as that embodied in the fifth paragraph indispensable. In the text proposed by Sir Cecil Hurst it was laid down in the first paragraph that the Secretary-General "shall inform any representative designated for that purpose by the United States

⁶ Omitted from these Proceedings.

of any proposal for obtaining an advisory opinion from the Court, and thereupon, if desired, an exchange of views."

It accordingly appeared that all proposals for obtaining an advisory opinion would give rise to a communication to the United States, so that it was not quite clear how the provision embodied in paragraph 4 of the proposal of Sir Cecil Hurst would take effect.

The CHAIRMAN, referring to the proposals of Sir Cecil Hurst and Mr. Root, said that he did not quite understand the scope of paragraph 2 of Sir Cecil Hurst's text. This paragraph dealt with cases coming under paragraph 1, in other words, cases in which the United States had declared that it had an interest. The value of a vote given by a Member of the League of Nations was as follows: If the question were one requiring unanimity, a single contrary vote constituted an absolute impediment without it being necessary for the State voting to give any reasons. In default of unanimity, the request for an advisory opinion could not go forward, and all the procedure which was intended to throw light on the motives which determined the action of the United States fell to the ground.

If, however, the question at issue was one for which a simple majority sufficed, and if the opposition to the request for an opinion were in a minority, the Council had the right to proceed with its request. It was then said that the United States would have the right to withdraw. The fact, however, of having given it the right embodied in paragraph 2 of the draft of Sir Cecil Hurst would not in any way have changed the position.

According to Mr. Root's proposals, whatever might be the nature of the dispute giving rise to a request for an advisory opinion, the United States reserved to itself the right to prevent any request being made for an opinion or to withdraw. The United States would thus have a right which was more extensive than that embodied in the draft of Sir Cecil Hurst, namely, the right to veto a request for an advisory opinion, whatever might be the size of the minority. If that interpretation were false, he would be delighted, as it would signify that the United States renounced its demand, at least in certain cases, but he did not think this was so.

M. POLITIS pointed out that the draft which he would have distributed to his colleagues met the various objections which had been made, and that a discussion of his note would probably accelerate the work of the Committee.

Sir Cecil Hurst presumed that the Chairman desired to go back to the remarks which he had made on the subject of paragraph 2 of his draft. The provisions of that paragraph, according to the Chairman, were ill-founded. He had, however, based those provisions on the Covenant itself. Article 4, paragraph 5, of the Covenant laid down that "any Member of the League, not represented on the Council shall be invited to send a representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League." That was a right enjoyed by Members of the League alone. It did not

apply to non-Members. Furthermore, the Member concerned was in no way obliged to respond to the request to send a representative to the Council. Article 5, paragraph 1, of the Covenant laid down that "except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting." The unanimity rule did not, therefore, apply to the State whose representative was not present. As the United States was not a Member of the League, it had no right to appeal to paragraph 5 of Article 4.

It followed, however, from the proposals and observations of Mr. Root that for psychological and political reasons there were grounds for believing that the United States would not wish to send a representative to the Council. Account must be taken of that fact, and an appropriate method provided. For that reason it was suggested that there should be an exchange of views between the Council and the representative of the United States. If that representative did not attend a meeting of the Council and of the Assembly, the unanimity rule embodied in Article 5 of the Covenant would not apply. From the practical point of view, it was desirable to frame a provision which would enable the opposition of the representative of the United States who was not present at a meeting of the Council or the Assembly to be given the same value as the veto of a member of the Council or the Assembly present at the meeting.

There followed the case in which a decision might be taken by a majority vote. The problem was to put the representative of the United States in the same position as a Member of the League which might be in the minority.

In the third paragraph of Article 4 of the preliminary draft of the Protocol of 1926, it had been laid down that for questions in which unanimity was necessary, in the event of a veto on the part of the United States, the Permanent Court would have the right to consider that, owing to that veto, the request had not been unanimously presented. In his draft, the Council or the Assembly would give to the United States' veto the same effect as a contrary vote cast by a Member of the League.

M. POLITIS wished to present two observations in order to elucidate the discussion. Sir Cecil Hurst, in his proposal, achieved the same result, in fact, as if the United States were a Member of the Council. If unanimity were necessary, the veto of the United States would suffice to prevent the request for an opinion being made. If a majority sufficed, the negative vote of the United States would be inoperative. Such was the thesis, and it gave rise to two objections. It was not known what were the cases which required unanimity or a majority vote, and it was precisely this ambiguity which caused the United States some misgiving. This was a practical objection of great importance, which it was necessary to take into account.

Secondly, it was not true, in practice, to say that the proposed consultation between the Council and the United States would have the same

effect as the presence of the United States at a meeting of the Council or the Assembly. In this connection, he would appeal to the authority of M. Raoul Fernandes, who, in a pamphlet entitled "The United States and the Permanent Court of International Justice," expressed himself as follows:

"... It would be useless to deny that certain Members of the League of Nations enjoy sufficient prestige to hinder, if not the Assembly, at least the Council, from taking up and dealing with a question if it should seem to them inopportune. Even if they are at the outset in a minority, there is a considerable probability that the other Members will surrender to their arguments or prefer to temporise. Events in fact occur in this way, and it would be disastrous if it were otherwise. The Council is strong only when its Members are in agreement, and its utility consists precisely in facilitating such agreement by means of the personal contact and continuous conversations which are only possible at Geneva.

"That being the case, the position in which it is proposed to place the United States in order to secure theoretical equality would be practically the following: The United States Government would from a distance impose useless vetoes upon proposals agreed upon at Geneva, whereas certain States near at hand would retain means of eliminating proposals, which seemed to them undesirable, before they took definite shape."

In the light of these practical considerations, therefore, the proposals under examination would not establish actual equality between the United States and the Members of the Council. The equality provided by Sir Cecil Hurst was theoretical. It was not a reality, and this second objection, in M. Politis' view, ruined the proposed scheme. The United States must not be regarded as a Member of the Council. A more radical solution was necessary, and he had himself proposed that solution in the document which was to be distributed to the members of the Committee.

Mr. Root said that the clause in the draft which he had proposed and the second clause in the draft of Sir Cecil Hurst was not in the nature of a suggestion but was an attempt to reproduce the decision of the Conference of 1926 communicated to the Government of the United States in the form of the Final Act of that Conference. The letter from Mr. Kellogg, the United States Secretary of State, was the reply to that communication. That letter had been referred to the Committee and explained the reasons why the proposal in the Final Act, which had been subscribed to by nearly all the signatories, could not be accepted in full by the United States of America. The letter had gone on to suggest that an informal exchange of views should take place in order to continue negotiations. The Final Act, therefore, was the basis of Mr. Kellogg's letter. Mr. Root would quote the following passage from that Final Act:

"As regards disputes to which the United States is not a party but in which it claims an interest, and as regards questions, other than disputes, in which the United States claims an interest, the Conference

understands the object of the United States to be to assure to itself a position of equality with States represented either on the Council or in the Assembly of the League of Nations. This principle should be agreed to. But the fifth reservation appears to rest upon the presumption that the adoption of a request for an advisory opinion by the Council or Assembly requires a unanimous vote. No such presumption, however, has so far been established. It is therefore impossible to say with certainty whether in some cases, or possibly in all cases, a decision by a majority is not sufficient. In any event, the United States should be guaranteed a position of equality in this respect; that is to say, in any case where a State represented on the Council or in the Assembly would possess the right of preventing, by opposition in either of these bodies, the adoption of a proposal to request an advisory opinion from the Court, the United States shall enjoy an equivalent right."

He read also the opening statement of the preliminary draft of a Protocol annexed to that Final Act, which was as follows:

"The States signatories of the Protocol of Signature of the Permanent Court of International Justice, dated December 16th, 1920, and the United States of America, through the undersigned duly authorised representatives, have agreed upon the following provisions regarding the adherence by the United States of America to the said Protocol, subject to the five reservations formulated by the United States."

Finally, he would draw the attention of the Committee to the final paragraph of Article 4 of that draft Protocol which was to the following effect:

"Should the United States offer objection to an advisory opinion being given by the Court, at the request of the Council or the Assembly, concerning a dispute to which the United States is not a party or concerning a question other than a dispute between States, the Court will attribute to such objection the same force and effect as attaches to a vote against asking for the opinion given by a Member of the League of Nations either in the Assembly or in the Council."

The draft clause which Mr. Root had proposed and the alternative wording suggested by Sir Cecil Hurst were not contrary to Article 4 of the proposed Protocol. They were not designed as amendments to that article. On the contrary, they had been drafted with a view to obtaining the assent of the United States of America to that article. The proposals would, in fact, give concrete form to the consent of the United States Government to the proposed Protocol.

If Article 4 as drafted by the Conference of 1926 were to be withdrawn, the whole basis of the proposals made by Mr. Root and Sir Cecil Hurst disappeared and the letter from Mr. Kellogg was of no further significance. To withdraw Article 4, however, would be for the Committee to return to the wilderness for an indefinite period and would mark not progress but the reverse.

The CHAIRMAN said that, according to the proposal of Sir Cecil Hurst, the United States of America would have the right to veto a request made to the Court for an advisory opinion, if unanimity were necessary for such a request. The Chairman had made a similar proposal at the previous meeting but it had been rejected by the Committee because the members had felt that the possibility should be left open for the Council or the Assembly to submit a request for an advisory opinion which had not been adopted unanimously but only by a majority. In the latter case, however, the vote of the Government of the United States of America could not prevent the Assembly or the Council from making such a request. If the representative of the United States were satisfied with this solution, the Committee itself might rest content; but the Chairman did not think this was the case. To assimilate the position of the United States to that of a Member of the League of Nations in cases where a request for an opinion was adopted by a majority vote would not, he thought, satisfy the desires of that country, which really wished to be able in certain cases to veto recourse to the Court even when such recourse had been voted by the majority. This point, he thought, should be made clear.

Jonkheer VAN EYSINGA had listened with great interest to the observations made by the members of the Committee, especially those of the Chairman and Mr. Root. His view was that the second paragraph of Sir Cecil Hurst's proposals should be adopted and this for two reasons. In the first place, as Mr. Root had pointed out, it only reproduced an essential provision to which the United States of America had agreed and, in the second place, there were the legal reasons in favour of its adoption, as Sir Cecil Hurst had indicated.

There might be a section of public opinion in America which desired to claim the right of veto in cases where a request for an advisory opinion had not been unanimous. The Committee now learned that the United States would be content if it were allowed to withdraw in such circumstances. This being so, M. van Eysinga urged the adoption of the second paragraph of Sir Cecil Hurst's proposal.

M. ITO had enquired why the fourth paragraph was essential. M. van Eysinga understood that it covered the following cases. Very exceptional circumstances might arise in which the Council, because of the existing situation, found it necessary to ask for an immediate opinion from the Court which, in view of those exceptional circumstances, might be the only means of calming public opinion. By the fourth paragraph of Sir Cecil Hurst's proposal, the Council could take such action without consulting the Government of the United States of America, but the disadvantage of the wording of the paragraph was that it allowed it to be supposed that the Council might incur certain penalties for doing so. M. van Eysinga, therefore, would prefer a somewhat different solution. In such circumstances, the Council, when asking the Permanent Court for an advisory opinion, would, at the

same time, inform the Government of the United States of its action. If the United States did not object, the usual procedure would be followed. If, on the other hand, objections were raised, the proceedings of the Court would automatically be interrupted. The objections of the United States, however, would take from two to three weeks to reach the Council and, by that time, the political situation might not be so urgent and the exchange of views between the Council and the United States could take place. While in favour, therefore, of paragraph 4 he would like it to be redrafted.

As regards paragraph 3 of Sir Cecil Hurst's proposals, it seemed to M. van Eysinga that it might be supposed that, for other reasons than the one mentioned in this paragraph, an agreement would not be reached. In those circumstances, also, the United States must still possess the same right to withdraw. The paragraph should, he thought, therefore be reworded to read as follows:

"If after the exchange of views provided for in paragraph 1 it shall appear that no agreement can be reached as to whether an advisory opinion should be asked for or not, the exercise of the powers of withdrawal provided for in Article 7 will follow," and so on.

M. POLITIS submitted his new draft of Article 4, which read as follows:

"1. With a view to ensuring that the Court shall not, without the consent of the United States, render an advisory opinion touching any dispute to which the United States is a party or in which it claims an interest, or touching any question other than a dispute in which it claims an interest, the following procedure shall be applied:

"2. The Secretary-General of the League of Nations shall inform the representative appointed for this purpose by the United States of any proposal to the effect that the Court shall give an advisory opinion.

"If such representative declares that the United States is not interested in the matter, the ordinary League of Nations procedure shall be followed without further modification.

"If, on the contrary, the representative declares that the United States is interested in the question, an exchange of views shall take place with all convenient speed between a Committee of three members appointed *ad hoc* according to the circumstances by the Council or the Assembly and a plenipotentiary delegate of the United States Government with a view to reaching an agreement,

(a) as to whether the question affects the interests of the United States, and

(b) whether it would be desirable for the Court to give an advisory opinion.

"3. If no agreement is reached on these lines, the Government of the United States shall be free to exercise its powers of withdrawal as provided for in Article 7 without any imputation of unfriendliness or unwillingness to co-operate generally for peace and goodwill."

He had thought it better both for reasons of form and of principle to make no attempt so settle the question whether unanimity must always be necessary for a request for an advisory opinion. It would never, in fact,

be possible to induce the Assembly to endorse a suggestion that unanimity was always necessary. Further, account must be taken of the representations of the International Labour Office which had urged that no such suggestion should be made. That being so, it still remained to satisfy the desires of the United States of America, and it was with that object that the formula of the 1926 Conference, redrafted by Sir Cecil Hurst and approved by Mr. Root, had been submitted to the Committee.

The Chairman, however, had already voiced the main objection to this formula which was that it did not cover the case in which an advisory opinion was sought for by a majority vote. If in such a case the United States of America would be content with one vote, which meant that she could not impose her veto on the majority, then M. Politis was prepared to withdraw his draft for he did not at all wish to be more American than the Americans themselves; but if, as he thought probable, Mr. Root would bow to the force of the Chairman's objection, then the only solution which appeared to M. Politis to be possible was that embodied in his own draft, which contained provisions for an exchange of views between a Committee of three persons appointed by the Council or by the Assembly and a plenipotentiary of the Government of the United States. Their duty would be to reach agreement if possible: (a) in regard to the question whether the matter in dispute affected the interests of the United States, and (b) whether it was opportune to seek an advisory opinion from the Court.

In the view of M. Politis, this was a suitable solution, for he could not imagine it possible that in a case where the United States of America had clearly shown that it had a real interest at stake and could not agree to recourse to the Court, the Council would disagree. Similarly, in the opposite case; if the Council were in the same position, it was impossible to believe that the United States would exercise its right of veto. The Committee should not draw up provisions to meet purely theoretical cases. The whole basis of the relations between the League and the United States of America in regard to the Permanent Court must be mutual confidence. So strong was the feeling in the United States of America in favour of international justice that it was almost impertinent to suggest that the United States would ever prevent its operation. Mr. Root had especially emphasized this and the Committee was more than justified in giving the greatest weight to his opinion.

M. Politis ventured to believe, therefore, that the solution which he proposed was the best in the circumstances. It left the United States free to withdraw, under the terms of paragraph 7, without any difficulty or any imputation of unfriendliness. There would be no necessity to amend the Covenant or the Statute of the Court, a matter which invariably gave rise to considerable difficulty.

Nor was there any necessity for a stipulation such as that contained in the fourth paragraph of Sir Cecil Hurst's proposal. A contract would have

been concluded between the United States and the Members of the League signatories to the Statute of the Court. If the terms of that contract were not fulfilled by the Council for urgent political reasons, the United States would merely inform the Court that a preliminary exchange of views had not taken place and the Court would then automatically be bound to declare itself incompetent. There was no need, therefore, to make special mention of this case in the solution.

In conclusion, M. Politis said that if Mr. Root preferred the proposal of Sir Cecil Hurst, despite the interpretation put upon it by the Chairman, he would naturally withdraw his own proposal.

Mr. Root said that he would very carefully study the proposal of M. Politis. The terseness and brevity with which it had been drafted might have caused M. Politis to omit a point of importance. Mr. Root, however, was at first sight much in favour of the proposal that an *ad hoc* Committee should be set up for the purpose of an exchange of views between the Council and the Government of the United States. Such a proposal was a practical step and was a useful method of procedure.

The remainder of the discussion was postponed to the next meeting.

FOURTH MEETING

HELD ON TUESDAY, MARCH 12TH, 1929, AT 5 P. M.

Chairman: M. SCIALOJA.

Present: All the members of the Committee.

9. *Question of the Accession of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice: Letter from the United States Government and Proposals by Mr. Root, Sir Cecil Hurst and M. Politis (continuation): Conclusions of the Sub-Committee of Four.*

M. POLITIS, reporting on behalf of the Sub-Committee of Four, said that the Sub-Committee had carefully examined the drafts submitted by Sir Cecil Hurst and by M. Politis himself, and had come to the conclusion that Sir Cecil Hurst's text was the closest to that of the preliminary draft of 1926, and as such conformed more nearly to the spirit of the United States Government's desiderata. The Sub-Committee further considered that Sir Cecil Hurst's draft was of a nature to satisfy all the Governments concerned and that it was therefore suitable for recommendation by the Committee with a view to the conclusion of an agreement. The Sub-Committee had thought that M. Politis' own proposal was calculated to confer various privileges on the United States and might thus give rise to objection on the part of the Members of the League, whereas Sir Cecil Hurst's draft placed the United States on the same footing of equality as the Members of the League since it gave the vote of the United States Government the same value as

that of the other Governments. Sir Cecil Hurst's draft, therefore, would naturally find easier acceptance than any other.

The Sub-Committee had accepted without difficulty paragraphs 1, 2 and 3 of Sir Cecil Hurst's draft. It had been more difficult to come to an agreement on paragraph 4 in view of the criticisms which had been made at the morning meeting by M. van Eysinga. In order to meet M. van Eysinga's objections, an attempt had been made to combine with paragraph 4 as it stood in Sir Cecil Hurst's draft a text which would cover the point raised by M. van Eysinga. The purport of that text would be that, when the Council addressed an application to the Hague Court for an advisory opinion, it would notify the United States thereof at the same time and, if the United States considered that its interests were involved, the Council should invite the Court to hold up the procedure until the United States Government had given its consent. Mr. Root had desired that Sir Cecil Hurst's fourth paragraph should be maintained in its original form, but he had intimated that he would have no objection to the addition of M. van Eysinga's text in a condensed form, since the latter text appeared in certain points to overlap that of Sir Cecil Hurst.

In conclusion, M. Politis hoped that the Committee would agree to the proposal of the Sub-Committee and would thus be able to congratulate itself upon having found a solution with the greatest possible rapidity.

M. FROMAGEOT said that he would like to have the proposal in writing before taking a decision.

M. POLITIS observed that the first three paragraphs of Sir Cecil Hurst's draft were to be maintained in their original form with the exception of the words "Where an interest of the United States is affected" in paragraph 3, which should be replaced by the words "whether an advisory opinion should be asked for." In the fourth paragraph, the original text of Sir Cecil Hurst was to be retained *in toto* but allowance was to be made for the proposal of M. van Eysinga, which would be either added to or merged in Sir Cecil Hurst's text.

Jonkheer VAN EYSINGA observed that, according to his proposal, the point made in Sir Cecil Hurst's text with regard to Article 73 was to be maintained. He did not think, therefore, that it would be difficult to agree upon a final text.

Sir Cecil HURST suggested that, as there had been no formal appointment of a Drafting Committee, it would save both time and trouble if the Committee authorised him, in conjunction with M. van Eysinga and the Committee of Four, to redraft his text in accordance with their ideas.

M. RAESTAD said that he had only just learned that a Sub-Committee had been set up to consider the redrafting of Article 4 of the preliminary draft of the 1926 Protocol, and he congratulated the Sub-Committee on the rapidity with which it had worked. Taking into consideration, however, the various drafts that had been submitted and especially the last draft,

M. Raestad wished to say that he preferred Mr. Root's original proposal to all the others, including the last. He would be glad if he could think that the successive drafts that had been proposed contained certain improvements in points of detail, but in his opinion the last draft submitted was, taking it as a whole, less satisfactory than the others.

He had at the morning meeting indicated two points regarding which he preferred Mr. Root's original draft. In the first paragraph of Mr. Root's draft it was laid down that "the Court shall not without the consent of the United States render an advisory opinion touching any dispute to which the United States is a party." On the contrary, the corresponding provision in the last draft would have the effect of placing the negotiations on a more or less political basis.

The second reason for which M. Raestad preferred Mr. Root's original draft was that it contained the provision that "if . . . it shall appear (1) that no agreement can be reached as to whether the question does touch an interest of the United States within the true meaning of the second paragraph of this Article . . . it shall be deemed . . . that the exercise of the powers of withdrawal provided in Article 7 hereof will follow naturally . . ." The omission of that provision in Sir Cecil Hurst's draft was, in M. Raestad's opinion, a serious disadvantage.

There were two further reasons for preferring Mr. Root's original proposals. First, there was the difference to which M. Ito had drawn attention at the morning meeting. In Mr. Root's original draft it was laid down that, whenever it was proposed to submit a request for an advisory opinion, the Council or the Assembly might invite an exchange of views with the United States, and such exchange of views would proceed with all convenient speed. The provision in question conferred on the Council or the Assembly powers to open up negotiations with the United States which undertook to follow up the suggestion made. The obligation rested, therefore, with the United States. In Sir Cecil Hurst's draft, on the other hand, it was stated that the Secretary-General should inform a representative of the United States, that was to say, that the obligation now rested on the Council or the Assembly. This division of responsibility did not seem to be quite logical.

Lastly, in Sir Cecil Hurst's draft it was laid down that the Council or the Assembly would "attribute to an objection of the United States the same force and effect as attaches to a vote against asking for the opinion given by a Member of the League in the Council or in the Assembly." In Sir Cecil Hurst's draft this provision formed an essential portion of the text, while in Mr. Root's proposals it was put in parenthesis and referred only to cases where the Council or the Assembly maintained its resolution to ask for an advisory opinion, in spite of the opposition of the United States of America.

Sir Cecil Hurst's and Mr. Root's drafts differed fundamentally from the proposals made in 1926 under which it was for the International Court to

attribute to an objection on the part of the United States the same force and effect as those attaching to a vote of a Member of the League. Sir Cecil Hurst's draft, therefore, imposed an obligation on the Council or the Assembly, without giving them the right to consult the Court. The fact that this provision was introduced in Mr. Root's draft only in a parenthesis gave it a less formal character than it had under Sir Cecil Hurst's draft.

Remembering that he was, in the present case, in the service of the Council of the League, M. Raestad was, for the foregoing reasons, unable to agree to the draft proposed by the Sub-Committee.

The CHAIRMAN suggested that the Committee should ask Sir Cecil Hurst and M. Politis, in consultation with Mr. Root and M. van Eysinga, to redraft paragraph 4 of Sir Cecil Hurst's proposal in accordance with M. Politis' report. The same members might also be requested to redraft the text of the preliminary draft of 1926 which contained certain terms which could not be left in their original form. The text of Sir Cecil Hurst's draft would then be inserted in that of the preliminary draft of 1926.

The Committee agreed to this proposal.

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TWELFTH MEETING

HELD ON MONDAY, MARCH 18TH, 1929, AT 11 A. M.

Jonkheer VAN EYSINGA (Vice-Chairman), in the Chair.

Present: All the members of the Committee, with the exception of M. Scialoja and M. Osuský.

25. *Question of the Adhesion of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice (continuation): Examination of the Revised Draft of the Preliminary Protocol of 1926.*

Sir Cecil HURST urged that the objections of M. Raestad should be discussed before the report and the protocol (Annex 7)⁷ were considered.

M. POLITIS did not think that any discussion of principle could be held at that stage. That discussion had been finished some days previously and M. Raestad's objections had been noted. The whole matter had been referred to a Drafting Committee, of which the main task had been to co-ordinate the proposals of Sir Cecil Hurst and M. van Eysinga in regard to Article 4. The new draft represented the results of the Drafting Committee's work and he did not think that the general discussion could be re-opened.

The VICE-CHAIRMAN pointed out that Sir Cecil Hurst had been asked

⁷ Draft report and protocol omitted from these Proceedings. For report and protocol as adopted by the Committee of Jurists, see Annex 11, *infra*, p. 316, and Protocol of Accession, *infra*, p. 349.

in drawing up his report and the new draft Protocol to consult Mr. Root on all points.

M. POLITIS agreed. All he desired to make clear was that, as the questions of principle had been dealt with, the forthcoming discussion could only concern matters of detail.

M. RAESTAD said that he had no intention of raising serious objections to the new revised draft which differed considerably from the first draft that had been discussed. The new draft was of such a nature that it was not necessary for him to make any important reservation. He thought, however, that he would be in order in making a general declaration at the moment of withdrawing his objections.

The CHAIRMAN said that the proposal of M. Raestad was in order, and called upon him to make his general statement.

M. RAESTAD said that the group of nations to which his country, Norway, belonged attached the greatest importance to the adhesion of the United States of America to the Court. Those countries, however, regarded the maintenance and even the development of the system of advisory opinions as of equal importance. The view had been expressed that the new arrangement to be concluded with the United States of America might result in the abolition of the system of advisory opinions. If this were so, or even if the new arrangement seriously diminished the efficiency of that system, the countries to which he had referred would be faced by an insoluble difficulty. Personally, M. Raestad was now convinced that the adoption of the new draft would not have this effect.

It might be said that, approximately, there were two classes of advisory opinions. There were, first of all, advisory opinions given regarding matters which might be described as political in character. In cases of this kind a special Committee of jurists might quite well be the organ best adapted to settle any doubtful legal points which might arise. His own view was, nevertheless, that in such cases also the Court would probably often be the best organ for the purpose. The second class of advisory opinions dealt with the position of a Member of the League *vis-à-vis* the other Members, within the terms of the Covenant, and with the position of the Members of the League *vis-à-vis* the organisations and institutions of the League and with the working of these organs and institutions. As regards these questions, a special Committee of jurists could never replace the Court; the Court was an essential feature of the League and must be used to interpret what might be described as the "law" of the League.

In proportion as the League developed and extended its activities these problems would become more numerous, more important and more complex. The importance of the system of advisory opinions would therefore tend to increase, if not in other respects, at least as regarded this last category of questions. It was essential, from the point of view of the efficiency and development of the League and the mutual confidence of its Members, that

these questions should be dealt with by the Court as a matter of course. The whole League was based on the principle that the questions relating to the internal affairs of the League—questions which were of interest exclusively to the League—should be dealt with by the Court as an institution of the League.

He would remind the Committee of the proposal made by M. Motta at the last session of the Assembly to the effect that it was essential to extend and strengthen the use of the system of advisory opinions. M. Raestad fully subscribed to this view.

He was well aware that the United States of America had no intention to destroy the system of advisory opinions nor even to diminish its efficiency. Similarly, the United States was not interested in the domestic affairs of the League. Nevertheless, it might happen that, contrary to the intentions of the parties, an arrangement concluded with the United States might result in a restriction of the use of the procedure of advisory opinions. It was for this reason that the nations interested in the maintenance and development of that system were obliged to study very carefully the provisions of the new arrangement with the United States. As he had said, however, he was sure that the proposed arrangement was not prejudicial to the system of advisory opinions.

The new draft was a very great improvement on previous texts. While no change of principle could now be made, it was the duty of each member of the Committee to elucidate any legal point which was obscure. He did not wish, therefore, to express his doubts regarding the draft as a whole, for he quite realised that it was impossible to split up what was intended to be an indivisible whole. He would, however, ask for explanations of detail. In the first place, he asked whether the sentence in Article 5:

“The Secretary-General shall . . . inform the United States of any proposal before the Council or the Assembly of the League for obtaining an advisory opinion from the Court”

meant that, each time any member of the Council or the Assembly proposed that recourse should be had to the Court, the Secretary-General should be invited to inform the United States of America of this proposal, or did it not simply mean that each time that the Council or the Assembly had had before it a report proposing that the Court should be asked for an advisory opinion the Secretary-General should notify the United States accordingly.

The VICE-CHAIRMAN invited M. Raestad to formulate the amendments which he might desire to suggest.

M. RAESTAD asked whether the reference to an exchange of views between the Council and the United States in Article 5 should not be followed by the words “if desired.” The omission of those words changed the whole aspect of the procedure.

Sir Cecil HURST said that the words had been omitted by error.

M. RAESTAD noted that different expressions were used in describing

the parties or signatories referred to in the Preamble, and in various articles of the draft. In the Preamble there was a reference to the States signatories of the new Protocol. In Article 3 there was a reference to the contracting States. The reference in Article 7 was to States which had ratified the Protocol of 1920. Were these expressions correctly employed in every case?

He noted also that in Article 9 it was said that the new Protocol would be open for signature to the States which "may in the future sign the Protocol of 1920." He did not think that the provision to the effect that the new Protocol should remain open for signature by such States was in accordance with the real position. In his view, the States which would sign later the Protocol of 1920 would be obliged to sign at the same time the present Protocol; the two documents must be regarded as an interdependent whole.

The second paragraph of Article 7 laid down that the present Protocol should come into force as soon as all the States which had ratified the Protocol of 1920, and also the United States, had deposited their ratifications. At the time when the United States adhered to the present Protocol must it not also adhere to and ratify the Protocol of 1920? The Protocol of 1920 was in effect the principal object of the present Protocol, and the ratification of one implied the ratification of the other.

He would say, in conclusion, that, though he was calling attention to these points of drafting, and while he still felt some hesitation regarding the draft as a whole, he desired to express the greatest admiration for the work of Mr. Root and Sir Cecil Hurst.

Sir Cecil HURST, replying to the various points which had been raised, stated that the words "before the Council or the Assembly of the League" in the first paragraph of Article 5 had been inserted in order to make it clear that the provisions of the article would not apply when the request for an advisory opinion came from an outside body and when it was not likely to be seriously entertained by the Council or the Assembly.

If, however, there was any likelihood of a request being seriously considered by the Council or Assembly of the League, the United States would, of course, be consulted in conformity with the stipulations of the article. He would urge that the references to this matter should be expressed in language as elastic as possible, and that the question of informing the United States should be left to the good sense and discretion of the Secretary-General and the Council.

The various expressions used in referring to States which had signed or ratified the Protocol had been carefully considered, and were, in his view, correct in each case. The Preamble referred to the States signatories of the Protocol of 1920. There were some eleven States which had signed the Protocol of 1920, but had not yet ratified it. Any one of those States might at any moment deposit its ratification, and would then be included among the States whose rights were defined in the Protocol of 1920. If the reference in the Preamble were confined to States which had ratified the Protocol of

1920, the States which had signed that Protocol, but had not yet ratified it, would be left out of account.

The reference to contracting States in Article 3 was to States which had both signed and ratified the 1920 Protocol. Only such States had the right to claim that no amendment of the Statute of the Court should be made without their consent.

He would draw attention, incidentally, to a mistake in the wording of the article, which should refer to "amendment of the Statute of the Court" and not to "amendment of the Statute annexed to the Protocol of 1920."

He did not think that M. Raestad was right in his contention regarding Article 9. He could not agree that the present Protocol was compulsory upon the signatories of the Protocol of 1920, and it was, in his view, impossible, by the present instrument, to take away from States which had signed the Protocol of 1920 the rights which they enjoyed under that Protocol. When the United States accepted the present Protocol, it would be open for them to become parties to the Protocol of 1920. He did not think it was possible for the stipulations of the present text to go any further than that.

He would like to say, in conclusion, that he was glad that M. Raestad had raised the points under discussion. He desired, and he felt sure his colleagues desired, that the present text should be unanimously and cordially approved by the whole Committee.

Two slight textual modifications were necessary. In the second paragraph of Article 5 it was necessary to add the word "such" before the words "exchange of views" to indicate that the contemplated exchange of views was that to which previous allusion had been made. It was also necessary in the last paragraph of that article to insert the words "of this article" after the words "paragraphs 1 and 2."

M. POLTRIS said he also desired to request certain explanations in regard to the present text. He did not think the reply of Sir Cecil Hurst on the point which had been raised concerning Article 9 was altogether satisfactory. What would be the position of States which had ratified the Protocol of 1920, but which did not ratify the present Protocol? Such States would not have accepted the United States reservations and their position would have to be considered. Was it right to regard the present Protocol as forming a whole with the Protocol of 1920?

The second question he desired to raise was more important. In several paragraphs of the present text, reference was made to the reservations of the United States. Those who read the document might not know exactly what was contained in those reservations, or in what order the reservations had been made. Was it not necessary either to explain the purport of the reservations in the text, or to annex to the Protocol the reservations themselves?

Another point arose in connection with paragraph 3 of Article 8 which

provided for the case in which a contracting State might desire to withdraw its acceptance of the special conditions attached by the United States to its adherence to the Protocol of 1920. He quite understood that this power of withdrawal should be accorded in respect of the fifth reservation. States not accepting that reservation, which had been granted as a concession to the United States, might be entitled to withdraw. The same reasoning, however, did not seem to apply to the second part of the fourth reservation to which reference was also made in the paragraph. The fourth reservation was to the effect that the Statute of the Court should not be changed without the consent of the United States. Such a stipulation could not be regarded as a special concession to the United States, but was a guarantee based upon the common law of nations. Obviously, the Statute of the Court could not be modified without the consent of all the contracting parties. He did not, therefore, see why the power of withdrawal should be referred to in connection with the second part of the fourth reservation, and he considered that this reference should be suppressed.

M. RAESTAD agreed with Sir Cecil Hurst that the text of the Protocol should be as elastic as possible. He would, however, draw attention to the fact that the text of Article 5 seemed precisely not to be elastic enough since it gave very little discretion to the Secretary-General of the League. It was laid down that the United States should be informed of any proposal before the Council or the Assembly. Would it not render the text more elastic if some term conveying the meaning of the word "serious" used by Sir Cecil Hurst were inserted before the word "proposal"? This would allow a considerably wider discretion in the application of the article.

Sir Cecil HURST said he was under the impression that the English text which referred to "any proposal before the Council or the Assembly of the League" was sufficiently elastic. A proposal which was before the Council or the Assembly would of necessity be a serious proposal. He wondered whether the French text "*soumise au Conseil ou l'Assemblée*" was satisfactory. A proposal might be submitted to the Council or the Assembly without being in effect before those bodies in the sense of the English expression.

After an exchange of views as to the precise significance of the French and English expressions, *it was decided* to maintain the text as it stood, on the understanding that the French text correctly conveyed the meaning of the English text.

Sir Cecil HURST, continuing his observations on Article 5, said he would hesitate to introduce the word "serious," which might have a limiting effect and might to some extent narrow the discretion of the Secretary-General and the Council. He thought the text as it stood ensured that, if there was any real question of the Council or the Assembly being asked to consider a request for an advisory opinion which might touch the interests of the United States, the provisions of the article would apply. He felt that the applica-

tion of the provision might safely be left in practice to the Secretary-General and the Council, interpreting the article as it stood.

M. RAESTAD said he was quite willing to withdraw his suggestion that a term conveying the idea "serious" should be inserted before the word "proposal," especially in view of the fact that Sir Cecil Hurst admitted that, in accordance with the present draft, a proposal which would justify a consultation with the United States would of necessity be sufficiently serious in character.

The point raised by M. Politis in respect of Article 9 was more important. He could not agree that it was impossible to impose on future signatories an obligation to sign the present Protocol and the Protocol of 1920 at the same time. There seemed to be a tendency to lay too much emphasis, as regards the Protocol of 1920, on its character of an agreement between the signatories. The Protocol must also be regarded as an element of the Constitution, so to speak, of the League of Nations, and he did not think that, in this matter, the acquired rights of third parties existed. The two Protocols, in his opinion, formed an inseparable whole, and he did not see that there was any legal objection to recognizing that fact. He desired to state clearly that it seemed to him inconceivable that a State could accept one Protocol and not the other, and that he considered it to be within the competence of the Assembly to pass a resolution to the effect that the two documents should be regarded as forming a whole.

M. PILORRI said he desired to support the original proposal of M. Raestad, which had been developed by M. Politis. He wished it to be laid down quite definitely in Article 9 that the present Protocol should be signed by States which had signed the Protocol of 1920. States were free to sign both documents or neither.

The reference in Article 8 to the second part of the fourth reservation of the United States was, he thought, explicable in the light of the discussions which had taken place in 1926. Such a reference had seemed necessary in 1926, owing to the fact that, in the Protocol of 1920, no provision had been made for withdrawal. The United States had asked for the right of withdrawal to be recognized, and it had accordingly been necessary to insert a specific reference to the point, in order to ensure equality of treatment between the United States and any other State which might ask for a similar privilege. He would ask M. Politis to leave Article 8 as it stood, since it contained an answer to scruples and difficulties which had been discussed in reference to the previous Protocol of 1926.

M. RUNDSTEIN referred to the proposal that the reservations of the United States should be embodied in the Preamble or annexed to the Protocol. If the present Protocol were accepted there would be no necessity for a Final Act, and the only place for a suitable summary of the reservations would seem to be the Preamble.

The VICE-CHAIRMAN said that perhaps Sir Cecil Hurst would consider

whether any summary of the reservations should be made, or whether these reservations should be annexed to the Protocol.

Sir Cecil HURST said his only objection was that the reservations of the United States were longer than the Protocol itself. He thought that the present reference in the Preamble was sufficiently explicit. It referred to the reservations in a way which would enable them to be easily identified.

The VICE-CHAIRMAN asked whether there was any objection to annexing the reservations.

Sir Cecil HURST said he would prefer to leave that question to Mr. Root. The important point was that the document should be issued in a form which would render it acceptable to the United States.

M. POLITIS again urged that the reservations should be annexed. Other wise readers of the Protocol in the near future would have some difficulty in understanding the document without first obtaining the text of the reservations.

Mr. Root said he would consider the matter. He felt it was important that the Protocol should be understood by a public which was not accustomed to reading legal documents. He felt that it was extremely desirable to reduce to a minimum any recitals in the Preamble or any protracted statement preceding the substance of the document. He would discuss the matter with Sir Cecil Hurst.

The VICE-CHAIRMAN said there remained the question of Article 9, and the question of the reference to the fourth reservation in Article 8. Those matters would have to be discussed at the next meeting of the Committee.

THIRTEENTH MEETING

HELD AT GENEVA ON MONDAY, MARCH 18TH, 1929 AT 4.30 P. M.

Jonkheer VAN EYSINGA (Vice-Chairman) in the Chair.

Present: All the members of the Committee, with the exception of M. Scialoja and M. Osuský.

26. *Question of the Accession of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice: Examination of the Revised Draft of the Preliminary Protocol of 1926 (continuation).*

The VICE-CHAIRMAN reminded the Committee that there remained over from the morning's discussion three points which had been put forward by M. Politis.

He would ask M. Politis if he wished to press his suggestion that the original five United States reservations should be included in an annex to the draft Protocol. He thought that M. Politis might be satisfied if, in his covering letter to the Council, the Vice-Chairman were to request the

Secretary-General to circulate the text of the five reservations to the Members of the League.

M. POLITIS assented to the Vice-Chairman's proposal.

The VICE-CHAIRMAN reminded the Committee that M. Politis' second point referred to the words occurring in the third paragraph of Article 8, which conferred on the contracting States, other than the United States, the right to withdraw their acceptance of the special conditions made by the United States as regards its adhesion to the Protocol, "in the second part of its fourth reservation and in its fifth reservation." The Vice-Chairman thought that M. Politis' wishes would be met if the words in brackets were omitted.

Mr. Root intimated that he had no objection to the omission of the words indicated.

Sir Cecil HURST said that he had expressly enclosed the words referred to by the Vice-Chairman in brackets in the hope that they would be omitted by the Committee in the final draft.

He would point out that the text of the articles had been copied from that of the 1926 draft and that the word "other" had been omitted in the English text (first line of the third paragraph) before the words "Contracting States".

M. POLITIS agreed to the omission proposed by the Vice-Chairman.

The VICE-CHAIRMAN observed that the third question left over was that of Article 9. Several objections had been made to that article at the morning meeting, at the end of which Mr. Root had made a suggestion which would probably meet the wishes of all the members of the Committee. The suggestion was to omit Article 9 altogether and to add at the end of Article 6 the following words: "and any future signature of the Protocol of December 16th, 1920, shall be deemed to be an acceptance of the provisions of the present Protocol."

Mr. Root thought that his suggestion came under the general necessary rule that it was impossible to have a dozen different conditions attached to the signatures of the various contracting parties to an international treaty, some signing only one part and others another. The effect of his proposal would be that, when the Protocol had been amended, all future signatories must accept it in its amended form.

M. GAUS considered Mr. Root's proposal very simple and practical and said that he personally would have no objection to it. From the theoretical point of view, however, it might be necessary to take into consideration all possible contingencies that might arise. It might therefore be preferable to leave Article 9 as it stood, since questions similar to those that had arisen in connection with the 1920 Protocol might arise again in connection with the amendments to the Statute adopted by the Committee. There were three matters to be considered, the revised draft Protocol of 1926 now before the Committee, the Protocol of 1920 and the Protocol containing the amendments

to the Statute. Would it not be possible for the Assembly to pass a resolution to cover all possible cases which might arise out of these three instruments?

The VICE-CHAIRMAN thought it would be difficult to find a formula to cover all possible theoretical cases and that it would be better perhaps for the Committee to confine itself at the moment to adopting Mr. Root's proposal.

M. GAUS thought it might be possible for the Assembly to pass a resolution laying down that in future no State could sign the 1920 Protocol in its original form, but only subject to any amendments which might have been made in it.

M. ANZILOTTI saw no difficulty, from the legal point of view, in the adoption of Mr. Root's proposal, which was very clear and precise. The new Protocol would only come into force when it had been signed and ratified by the Contracting Parties to the 1920 Protocol. It was only natural that the Contracting Parties to the 1920 Protocol should say that those States which had signed but had not yet ratified that Protocol had no right to expect the other contracting Parties to wait indefinitely for their ratification nor the right to hold up for this purpose any amendments which they might think necessary to make in the Statute. It was true that the 1920 Protocol did not mention any time limit for signature and ratification; it would, however, be scarcely reasonable to interpret the invitation to sign and ratify as entailing a right for the aforesaid States that the invitation should be neither withdrawn nor modified. It followed that such States would be at liberty to ratify the Protocol if they had signed it or might sign it first if they had not yet done so, upon the new conditions offered them by those Contracting Parties which had signed and ratified it.

M. ITO thought the difficulties contemplated by M. Politis in regard to Article 9 would occur only rarely in actual fact. In view of those difficulties, M. Ito preferred Mr. Root's proposal by which the Committee would establish a connection between the present Protocol and the Protocol of 1920. But the same difficulties in a more serious form would arise as between the 1920 Protocol and the Protocol to be established with any amendments that might be adopted. To meet this case an appropriate solution should be found on the lines proposed by M. Anzilotti, with such modifications as might be necessary. In M. Ito's opinion, the difficulties should be solved as and when they occurred, and it was unnecessary to have any instrument to solve them collectively.

M. URRUTIA thought Mr. Root's solution so clear that the Committee could agree to it without further discussion. It corresponded, indeed, to the present situation, that was to say, the new juridical situation created by the adoption of the new Statute. Legally, indeed, the old Statute would disappear as the result of the agreement of the Contracting Parties to accept the amended Statute. That being so it was, in point of fact, unnecessary to do anything at all. There was only one possible eventuality which might

arise (and that being so it was not worth while providing for), namely, that a State which had signed but had not yet ratified the 1920 Protocol might desire to ratify it after all the other Contracting Parties had accepted the new Protocol. Such ratification would not be legally valid since the old Protocol would have disappeared.

Mr. ROOT observed that he had not intended to present a hard and fast proposal but rather a suggestion, and he enquired whether M. Gaus would be satisfied if, in his proposal, the word "ratification" were substituted for the word "signature."

M. GAUS said that he was prepared to accept Mr. Root's first proposal. He had only been contemplating possible cases that might arise and he agreed that there would be practical difficulties in finding a formula to cover all cases.

The VICE-CHAIRMAN noted that M. Gaus accepted Mr. Root's proposal in its original form.

M. RAESTAD preferred the term "ratification" to the term "signature," since he did not think that in this case "signature" could be taken to mean acceptance. In the case of treaties subject to ratification, signature was only the starting-point for acceptance and acceptance itself only followed when ratification had taken place. He enquired whether the Committee considered that the term "signature" implied acceptance.

The VICE-CHAIRMAN and M. POLITIS thought that it did.

The VICE-CHAIRMAN noted that the Committee agreed to the term "signature."

The amendment proposed by Mr. Root was adopted.

On the suggestion of the VICE-CHAIRMAN, the draft Protocol was then read article by article with a view to ensuring the exact concordance of the two texts.

Article 4

M. FROMAGEOT observed that the proper method of rendering the word "substantially" in the French text would be to omit the words "quant au fond" and to insert after the word "dispositions" the word "essentielles."

In reply to a question of M. Gaus, M. Fromageot said that the words "dispositions essentielles" in the phrase as drafted would mean that the "dispositions" formed the essential part of the articles in question.

Article 8

M. RUNDSTEIN observed that it was clear that denunciation of the Protocol could not have retroactive effect, but he thought that it would be wise to say so definitely. A provision to that effect was included in the arbitration conventions, for instance, in that between Germany and Switzerland and also in the Council's resolution of May 17th, 1922. He suggested, therefore, that provision should be made that denunciation should not affect disputes of which the Court had already been seized.

M. POLITIS considered that M. Rundstein's point was a purely theoretical one and that there was no need to make any special provision to meet this case.

The VICE-PRESIDENT agreed with M. Politis.

M. RAESTAD said that the fact that the United States did or did not adhere to the Statute could not affect cases actually before the Court. It was a matter of indifference, in respect of such cases, whether a country adhered or not to the Statute. The analogy mentioned by M. Rundstein did not apply, for jurisdiction existed independently of accession, whereas, in the case of arbitration treaties those treaties themselves created the jurisdiction.

M. RUNDSTEIN said that he would not press his point.

The VICE-CHAIRMAN noted then that the Committee agreed to adopt the draft Protocol in the following amended form:

[Here follows the text of the protocol as finally adopted which agrees, word for word, with the protocol as signed at Geneva, Sept. 14, 1929, and reprinted herein, *infra*, p. 349.]

27. *Question of the Accession of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice (continuation): Examination of the Draft Report submitted by Sir Cecil Hurst.*

Sir Cecil HURST read his draft report (Annex 8) on the accession of the United States to the Protocol of Signature of the Statute of the Court.

In the course of the discussion on the report, M. ANZILOTTI pointed out that the Protocol, the text of which had been revised by the Committee, would be concluded not between the States signatories of the 1920 Protocol and the United States of America, but between the States which had ratified, or might ratify, the 1920 Protocol and the United States.

The VICE-CHAIRMAN and other members of the Committee observed that, whereas the accession of the States which had ratified, or might hereafter ratify, the 1920 Protocol was indispensable, nothing prevented other States, even those which had only signed the 1920 Protocol, from also signing the new Protocol. The term "signatory States" appeared, moreover, in the text of the revised draft of the Protocol of 1926, and the use made of that term in Sir Cecil Hurst's report, was in accordance with current practice.

M. PILOTTI said that in 1926 it had been necessary to make use of the term "signatory States" because some States which had not ratified the 1920 Protocol had been represented at the Conference (Dominican Republic, Liberia, Luxemburg, Panama, Persia). There was no reason why the Committee should adopt the same procedure, which in M. Pilotti's view, was incorrect.

Sir Cecil Hurst's report was adopted with certain amendments on points of details.

28. *Communication to the Press of the Revised Draft of the 1926 Protocol.*

On the proposal of the VICE-CHAIRMAN, the Committee decided to communicate to the Press the revised draft of the 1926 Protocol, in order to obviate any possibility of the publication of an incorrect text.

* * * * *

REPORT ADOPTED BY THE COMMITTEE OF JURISTS

ON THE QUESTION OF THE ACCESSION OF THE UNITED STATES OF AMERICA TO
THE PROTOCOL OF SIGNATURE OF THE STATUTE OF THE COURT¹

On February 19th, 1929, the Secretary of State of the United States of America addressed to each of the Governments which had signed the Protocol of Signature of the Statute of the Permanent Court of International Justice, dated December 16th, 1920, and also to the Secretary-General of the League of Nations a note suggesting that an exchange of views might lead to an agreement with regard to the acceptance of the stipulation set forth in the resolution adopted by the Senate of the United States on January 27th, 1926, as the conditions upon which the United States would adhere to the said Protocol. This note was considered by the Council of the League of Nations at its meeting on March 9th, 1929, and cordial satisfaction was expressed at the prospect which the note held out that a solution might be found for the difficulties which had prevented the adherence of the United States in 1926. On the same date, a resolution was adopted by the Council, requesting the Committee of Jurists, which had been appointed by the Council at its meeting on December 14th, 1928, to consider the revision of the Statute of the Permanent Court of International Justice, to deal with this question as well as those with which it was already charged and to make any suggestions which it felt able to offer with a view to facilitating the accession of the United States on conditions satisfactory to all the interests concerned.

It has been of the greatest assistance to the Committee in the accomplishment of this additional task that among its members was to be found the Honourable Elihu Root, formerly Secretary of State of the United States, and one of the members of the Committee which in 1920 framed the original draft of the Statute of the Court. His presence in the Committee has enabled it to re-examine with good results the work accomplished by the Special Conference which was convoked by the Council in 1926 after the receipt of the letter of March 2nd of that year from the then Secretary of State of the United States informing the Secretary-General of the League that the United States was disposed to adhere to the Protocol of December 16th, 1920, on certain conditions enumerated in that letter. The United States did not see its way to participate, as it was invited to do, in the Special Conference of 1926, and, unfortunately, the proposals which emanated from that Conference were found not to be acceptable to the United States.

¹ Rapporteur: Sir Cecil Hurst. [Annex 11 to the Minutes of the Committee of Jurists.]

Nevertheless, as is shown by the note of February 19th, 1929, from Mr. Kellogg, the margin of difference between the requirements of the United States and the recommendations made by the Special Conference to the Powers which had signed the Protocol of December 16th, 1920, is not great. For this reason, the Committee adopted as the basis of its discussions the Preliminary Draft of a Protocol annexed to the Final Act of that Conference and has introduced into the text the changes which it believes to be necessary to overcome the objections encountered by the draft of 1926 and to render it acceptable to all parties. This revised text is now submitted to the Council of the League.

The discussions in the Committee have shown that the conditions with which the Government of the United States thought it necessary to accompany the expression of its willingness to adhere to the Protocol establishing the Court owed their origin to apprehension that the Council or the Assembly of the League request from the Court advisory opinions without reference to interests of the United States which might in certain cases be involved. Those discussions have also shown that the hesitation felt by the delegates to the Conference of 1926 as to recommending the acceptance of those conditions was due to apprehension that the rights claimed in the reservations formulated by the United States might be exercised in a way which would interfere with the work of the Council or the Assembly and embarrass their procedure. The task of the Committee has been to discover some method of ensuring that neither on the one side nor on the other should these apprehensions prove to be well founded.

No difficulty has at any time been felt with regard to the acceptance of the conditions laid down by the United States except in so far as they relate to advisory opinions, and the task of the Committee would have been simplified if its members had felt able to recommend that the system of asking the Court for an advisory opinion upon any particular question should be abandoned altogether. The Committee, however, is of opinion that it cannot recommend any such drastic solution. The system of asking the Court for an advisory opinion has proved to be of substantial utility in securing a solution of questions which could not conveniently be submitted to the Court in any other form. It has also on occasions enabled parties to a dispute to ask for the submission of their difference to the Court in the form of a request for an advisory opinion when they were for various reasons unwilling to submit it in the form of international litigation.

The Committee has also felt obliged to reject another method by which satisfaction might without difficulty be given to the conditions laid down by the United States. It is that of recommending the adoption of a rule that in all cases a decision on the part of the Council or of the Assembly to ask for an advisory opinion from the Court must be unanimous. As is pointed out in the Final Act of the Special Conference of 1926, it was not then possible to say with certainty whether a decision by a majority was not sufficient. It is

equally impossible to-day. All that is possible is to guarantee to the United States a position of equality in this matter with the States which are represented in the Council or the Assembly of the League.

Furthermore, mature reflection convinced the Committee that it was useless to attempt to allay the apprehensions on either side, which have been referred to above, by the elaboration of any system of paper guarantees or abstract formulæ. The more hopeful system is to deal with the problem in a concrete form, to provide some method by which questions as they arise may be examined and views exchanged, and a conclusion thereby reached after each side has made itself acquainted with the difficulties and responsibilities which beset the other. It is this method which the Committee recommends should be adopted, and to provide for which it now submits a text of a Protocol to be concluded between the States which signed the Protocol of 1920 and the United States of America (see Appendix, next page).²

The note of February 19th, 1929, from the Secretary of State of the United States makes it clear that the Government of the United States has no desire to interfere with or to embarrass the work of the Council or the Assembly of the League, and that that Government realises the difficulties and responsibilities of the tasks with which the League is from time to time confronted. It shows that there is no intention on the part of the United States Government of hampering, upon unreal or unsubstantial grounds, the machinery by which advisory opinions are from time to time requested. The Committee is thereby enabled to recommend that the States which signed the Protocol of 1920 should accept the reservations formulated by the United States upon the terms and conditions set out in the articles of the draft Protocol. This is the effect of Article 1 of the draft now submitted.

The next three Articles reproduce without substantial change the corresponding articles of the draft of 1926.

The fifth Article provides machinery by which the United States will be made aware of any proposal before the Council or the Assembly for obtaining an advisory opinion and will have an opportunity of indicating whether the interests of the United States are affected, so that the Council or the Assembly, as the case may be, may decide its course of action with full knowledge of the position. One may hope with confidence that the exchange of views so provided for will be sufficient to ensure that an understanding will be reached and no conflict of views will remain.

The provisions of this Article have been worded with due regard to the exigencies of business in the Council of the League. The desirability of obtaining an advisory opinion may only become apparent as the session of the Council is drawing to a close and when it may not be possible to complete the exchange of view before the members of that body separate. In that case, it will be for the Council to give such directions as the circumstances may require, in order to ensure that the intentions of the Article are carried out.

²Same as Protocol of Accession, signed Sept. 14, 1929, *infra*, p. 349.

The request addressed to the Court may, for instance, be held up temporarily, or it may be despatched with a request that the Court will nevertheless suspend action on the request until the exchange of views with the United States has been completed. The provisions of the Article have purposely been framed so as to afford a measure of elasticity in its application. Similarly, if the Court has commenced the preliminary proceedings consequent upon the receipt of the request for an advisory opinion and has given notice of the request to the United States in the same way as to the other Governments, the proceedings may, if necessary, be interrupted in order that the necessary exchange of views may take place. What is said in this paragraph with regard to requests for advisory opinions made by the Council would also apply to requests by the Assembly in the event of the Assembly making any such request.

The provisions of this Article should in practice afford protection to all parties in all cases, but if they do not, it must be recognized that the solution embodied in the present proposal will not have achieved the success that was hoped, and that the United States would be fully justified in withdrawing from the arrangement. It is for this eventuality that provision is made in the last paragraph of the Article. It may be hoped that, should any such withdrawal by the United States materialise, it would in fact be followed or accompanied by the conclusion of some new and more satisfactory arrangement.

In order to ensure so far as possible that the parties to the Protocol of 1920 shall be identical with the parties to the new Protocol, Article 6 provides that any State which in future signs the Protocol of 1920 shall be deemed to accept the new Protocol.

The remaining provisions of the draft Protocol do not call for detailed comment, because they are in substance similar to the corresponding provisions of the draft Protocol of 1926.

It is necessary to consider what steps will be required to bring the Protocol of which the text is now submitted into force in the event of the recommendations of the Committee being accepted.

If the terms of the Protocol are approved by the Council, it will be advisable that the Secretary-General should be directed, when answering Mr. Kellogg's note of February 19th, 1929, to communicate the draft to the Government of the United States. Since the Protocol, if approved, covers the entire ground of Mr. Kellogg's note, its transmission with a statement of the Council's approval would seem to constitute an adequate reply to that note. It should at the same time be communicated to all the States which signed the Protocol of December 16th, 1920, together with a copy of the resolution of the Senate of the United States, dated January 27th, 1926, containing the reservations of the United States.

It should also be communicated to the Assembly, in which the proposal for the appointment of this Committee originated, in order that, if its terms

are acceptable to that body, a resolution approving it may be passed by the Assembly in the course of its ensuing session. Any action taken by the Assembly should be communicated to the signatory States which are called upon to determine whether or not to sign the new Protocol now proposed.

If the replies from the various Governments indicate a desire for a further exchange of views with regard to the nature of the proposed arrangement with the United States or to the terms of the draft Protocol, it will be for the Council to decide whether such exchange of views should proceed through the diplomatic channel or whether it is necessary to convoke a further special conference for the purpose, at which States not Members of the League might be represented. In any event, such exchange of views should, if possible, be completed before the conclusion of the Assembly, in order that the approval by the Assembly may be obtained in 1929. A copy of the Protocol in terms approved will then be prepared for signature and every effort should be made to secure that delegates to the meeting of the Assembly or of the special conference, if there should be one, should be authorised to sign the instrument and should actually sign it before they leave Geneva. The signature of representatives of States not Members of the League should be obtained at the same time.

As provided in Article 7 of the draft, the Protocol will come into force as soon as it has been ratified by the States which have ratified the Protocol of December 16th, 1920, and by the United States, and, as soon as it has come into force, it will be possible for the United States to take the necessary steps to become a party to the Protocol of December 16th, 1920, and to any further protocol which may have been concluded for introducing amendments into the Statute of the Court.

When that happy result has been achieved, it will be possible to feel that further progress has been made in establishing the reign of law among the nations of the world and in diminishing the risk that there may be a resort to force for the solution of their conflicts.

FIFTY-FIFTH SESSION OF THE COUNCIL OF THE LEAGUE
OF NATIONS

MADRID, JUNE 12, 1929

2435. *Question of the Accession of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice.*¹

M. Scialoja read the following report and draft resolution:

"Referring to a letter from the Secretary of State of the United States of America, dated February 19th, 1929, the Council of the League of Nations, on March 9th following, requested the Committee of Jurists mentioned in its resolutions of December 13th and 14th, 1928, to make any suggestions which it felt able to offer with a view to facilitating the accession of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice.

"The Committee of Jurists, which sat from March 11th to 19th, 1929, set forth in a report, to which is annexed a draft Protocol, the results of its study of the question. My colleagues have seen this report, which follows the Committee's report on the examination of the Statute of the Court in document C. 142. M. 52. 1929 (Annex 1137). The members of the Council will have found in the report, together with the proposals submitted, a statement of the grounds on which those proposals are based.

"The procedure proposed by the Committee seems to constitute the best means of realising the end in view. The Jurists in their report have contemplated that:

"If the terms of the Protocol are approved by the Council, it will be advisable that the Secretary-General should be directed, when answering Mr. Kellogg's note of February 19th, 1929, to communicate the draft to the Government of the United States. Since the Protocol, if approved, covers the entire ground of Mr. Kellogg's note, its transmission with a statement of the Council's approval would seem to constitute an adequate reply to that note. It should, at the same time, be communicated to all the States which signed the Protocol of December 16th, 1920, together with a copy of the resolution of the Senate of the United States, dated January 27th, 1926, containing the reservations of the United States."

"As the Assembly is called upon to pronounce upon the matter at its next session, the procedure recommended gives the States which are parties to the Court's Statute, and the United States, time to proceed in the interval to the necessary study of the question.

"In view of what I have said, I have the honour to submit to the Council the following resolution:

"The Council adopts, together with the draft Protocol annexed thereto, the report submitted to it by the Committee of Jurists on the

¹ Official Journal of the League of Nations, July, 1929, pp. 997-998.

question of the accession of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice.

“Accordingly, it instructs the Secretary-General:

“(1) To reply to Mr. Kellogg’s note of February 19th, 1929, and to communicate to the United States Government, together with the present Council resolution, the text of the said report and of the said draft Protocol;

“(2) To make the same communication to the States signatories of the Protocol of December 16th, 1920, and to transmit also to those States the text of the resolution of the Senate of the United States, dated January 27th, 1926, embodying the latter’s reservations.

“In order that the Assembly, being, like the Council, a body whose procedure in regard to the method of seeking advisory opinions from the Court would be affected by the adoption of the Protocol proposed by the Committee of Jurists, may have an opportunity of expressing its opinion thereon, the Council decides to instruct the Secretary-General to transmit to the Assembly the report of the Committee and the draft Protocol and to place the question on the supplementary agenda of the tenth ordinary session of the Assembly.”

The draft resolution was adopted.

FIFTY-SIXTH SESSION OF THE COUNCIL OF THE LEAGUE OF NATIONS

GENEVA, AUGUST 31, 1929

2477. *Question of the Accession of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice.*¹

M. Scialoja read the following report and draft resolution:

“A Conference of Government representatives is meeting, on the invitation of the Council, on September 4th next, for the purpose of considering the question of amending the Statute of the Permanent Court of International Justice. I venture to suggest to my colleagues that it would be desirable to invite this Conference also to consider the report made by the Committee of Jurists concerning the accession of the United States of America to the Protocol of Signature of the Court’s Statute and the draft Protocol in which the Jurists embodied their recommendations.

“At its last session,² the Council adopted this report and Protocol as satisfactory from its point of view. It directed the Secretary-General to transmit them to the interested Governments and also to place them upon the agenda of the Assembly, in order that they might be approved by that body if found satisfactory by it.

“This decision of the Council left open the question of the procedure by which—if the recommendations of the Jurists were acceptable both to the

¹ Official Journal of the League of Nations, November, 1929, p. 1456.

² *Supra*, p. 321.

Council and Assembly and also to all the Governments concerned, whether Members of the League or not—the Protocol necessary to give effect to them should be open for signature on behalf of the Governments. My colleagues may remember that the report of the Jurists contemplated that, if possible, the Council would take any necessary action to secure that such an instrument should be drawn up and signed on behalf of as many Governments as possible before the close of the Assembly's session.

"At the time of the Council's last session, it appeared premature to propose that the Council should take action with the above purpose. I have now, however, reasons to believe that it would be convenient, and would further the object which we all have in view, that the Jurists' recommendations and draft Protocol should not merely be considered by the Assembly but, if approved by the Assembly, should also be examined before the close of the Assembly's session by a Conference at which all the States parties to the Court's Statute would be represented. The Conference already convened by the Council could, I believe, conveniently undertake this task. It will not, I hope, be difficult for the delegates to obtain from their Governments any additional powers which may be necessary; the Governments represented at the Assembly have indeed doubtless already considered the subject in all its aspects, for the purpose of the instructions which they have given to their delegates at the Assembly.

"I have, accordingly, the honour to propose the following resolution:

"The Council approves the report of the representative of Italy. It decides to invite the Conference convened in virtue of its resolution of June 12th, 1929, to take also into consideration the report and draft Protocol drawn up by the Committee of Jurists on the subject of the accession of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice, if the recommendations of the Jurists are approved by the Assembly. By this method, if the Conference is also in agreement with those recommendations, the Protocol necessary to give effect to them will be able to be drawn up and opened for signature as soon as possible."

The draft resolution was adopted.

TENTH ORDINARY SESSION OF THE ASSEMBLY OF THE LEAGUE OF NATIONS

THIRD PLENARY MEETING

Tuesday, September 3, 1929, at 4 p. m.¹

* * * * *

- 17.—*Question of the Accession of the United States of America to the Statute of the Permanent Court of International Justice: Communication from the Chairman of the First Committee*

¹ Records of the Tenth Assembly, League of Nations Official Journal, Special Supplement No. 75, p. 32.

The PRESIDENT:

Translation: I have received the following letter, dated September 3rd, from the Chairman of the First Committee, M. Vittorio Scialoja:

"By its resolution of August 31st, the Council of the League of Nations decided to invite the Conference which is to consider the question of amendments to the Statute of the Permanent Court of International Justice to take into consideration also the subject of the accession of the United States of America to the Statute of the Court, if the recommendations of the Jurists are approved by the Assembly.

"The First Committee discussed the matter this morning, and decided that it was desirable that the Conference should consider the question before it was brought up before the Assembly.

"I have the honour, accordingly, to request you to be good enough to submit to the Assembly, if possible this afternoon, the following draft resolution, which would make it possible to follow the procedure suggested by the First Committee:

"The Assembly invites the Conference of Government representatives which has been convened in virtue of the Council's resolution of June 12th, 1929, to take forthwith under examination the report and draft Protocol drawn up by the Committee of Jurists in regard to the question of the accession of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice."

"(Signed) V. SCIALOJA,
"Chairman of the First Committee."

Immediately on receipt of this communication I requested the Secretary-General to have printed and urgently distributed to all the delegations the text of the draft resolution submitted to the Assembly by the Chairman of the First Committee on behalf of that Committee.

The subject of the resolution proposed on behalf of the First Committee would seem to be such as to enable the Assembly to take a decision without delay, having regard to the reasons of expediency which have justified a procedure of this expeditious character.

Rule 17, paragraph 2, of the Rules of Procedure of the Assembly provides that "no proposal shall be discussed or put to the vote at any meeting of the Assembly unless copies of it have been circulated to all representatives not later than the day preceding the meeting." Nevertheless, there would seem to be no objection to an exception to this rule being made in this instance, since the resolution submitted on behalf of the First Committee relates to the procedure to be followed in studying the question, and does not concern the substance of the question itself.

Moreover, the Conference to deal with the question of amendments to the Statute of the Permanent Court of International Justice will be holding its first meeting shortly, and it would be desirable to enable it, from the outset of its work, to give effect to the wish expressed by the Assembly.

I think, therefore, I may call upon the Assembly to take an immediate

decision in regard to the draft resolution submitted to it by the First Committee.

If no one desires a vote to be taken, and if there are no observations, I shall consider this draft resolution unanimously adopted by the delegations present.

The draft resolution was adopted.

The draft resolution having been adopted, I shall, on behalf of the Assembly, transmit it to the President of the Conference which will deal with the question of amendments to the Statute of the Permanent Court of International Justice.

**Minutes of the Conference Regarding the Accession of the United States
of America to the Protocol of Signature of the Statute of the
Permanent Court of International Justice ¹**

HELD AT GENEVA FROM SEPTEMBER 4TH TO 12TH, 1929

[Delegates at the conference represented Australia, Austria, Belgium, Brazil, Bulgaria, British Empire, Canada, Chile, China, Colombia, Cuba, Czechoslovakia, Denmark, Dominican Republic, Estonia, Finland, France, Germany, Greece, Guatemala, Hungary, India, Irish Free State, Italy, Japan, Latvia, Liberia, Lithuania, Luxemburg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Persia, Peru, Poland, Portugal, Roumania, Salvador, Siam, Spain, Sweden, Switzerland, Uruguay, Venezuela, Yugoslavia.]

FIRST MEETING (PRIVATE, THEN PUBLIC)

HELD ON WEDNESDAY, SEPTEMBER 4TH, 1929, AT 11 A. M.

President: Jonkheer W. J. M. VAN EYSINGA.

* * * * *

6. Agenda of the Conference.

The PRESIDENT [after briefly outlining the two questions on the agenda of the Conference] thought it would be best to deal first with the question of the accession of the United States of America to the Statute of the Court, for that was doubtless the matter in which everybody was most interested. Subsequently, the Conference could re-examine the articles of the Statute of the Court. He made this suggestion the more readily because he understood that the Secretary-General had a statement to make in that connection, which he was sure the Conference would be very interested to hear.

¹ Series of League of Nations Publications V. Legal 1929. V. 18. Official No. C. 514. M. 173. 1929. V. This document also contains minutes regarding the revision of the Statute of the Permanent Court of International Justice considered by the same conference, which are omitted from these Proceedings. The paragraphs omitted are as follows, by numbers as given in the minutes:

1. Election of the President.
2. Question of the publicity of the meetings.
3. Election of the Vice-Presidents.
4. Question of the appointment of a committee on the credentials of delegates.
5. Rules of procedure of the conference.
9. Revision of the Statute of the Permanent Court of International Justice.
10. Appointment of the committee for the verification of credentials.
- 11-12. Revision of the Statute of the Permanent Court of International Justice.
13. Question of the appointment of a drafting committee.
14. Revision of the Statute of the Permanent Court of International Justice.
15. Procedure for submitting the protocols to the Assembly and for their signature.
16. Close of the session.

The SECRETARY-GENERAL then made a communication to the Conference in the following terms:

"Mr. President, Gentlemen,—I thank you for giving me the opportunity of making this statement to the Conference.

"I am informed from a sure source, which I cannot divulge but on which the members of the Conference can absolutely rely, that the Secretary of State of the United States of America, after careful consideration, is of opinion that the draft Protocol drawn up by the Committee of Jurists would effectively meet the objections set forth in the reservations made by the United States Senate and would constitute a satisfactory basis for the United States to adhere to the Protocol and Statute of the Permanent Court of International Justice, dated December 16th, 1920. After the States signatory to the Protocol of Signature and the Statute of the Permanent Court have accepted the draft Protocol, the Secretary of State will request the President of the United States for the requisite authority to sign, and will recommend that it be submitted to the Senate of the United States with a view to obtaining its consent to ratification."

*The Conference decided to treat this statement as confidential for the time being.*²

(The Conference went into public session.)

7. *Question of the Order in which the two Items on the Agenda should be discussed.*

The PRESIDENT explained that he wished to make good a slight omission on his part. He had forgotten to remind the Conference that the subject matter of the Protocol had been referred by the Council to the Assembly, and that the First Committee of the Assembly, which had worked very expeditiously, had referred it to the Conference, so that it was duly authorised to consider the question. Sir Cecil Hurst's report and the draft Protocol were embodied in document A. II. 1929. V. which had been distributed to all the delegations.³

[M. G. DE BLANCK (Cuba), upon instructions from his Government, read a statement calling attention to the acceptance in the draft protocol of the reservation of the United States Senate whereby the Statute of the Permanent Court of International Justice shall not be amended without the consent of the United States, and pointing out that any modifications of the Statute by the present Conference, at which the United States is not represented, would have to be submitted to the United States. The Cuban Government therefore proposed to postpone discussion of modifications of the Statute until the United States has signed the Protocol of Accession and takes part officially in the work of modifying the Statute. After considerable discussion, the PRESIDENT replied to M. de Blanck's proposal, stating that the Conference could not omit one of the items from its agenda.]

² For Secretary of State Stimson's subsequent letter of Nov. 18, 1929, to President Hoover, see Supplement to the AMERICAN JOURNAL OF INTERNATIONAL LAW, January, 1931 (Vol. 25), p. 50.

³ Reproduced herein, *supra*, p. 316, and *infra*, p. 349.

He [the President] understood that, with very few exceptions, all the delegates were agreed that they should deal with both questions and should begin with that of the accession of the United States.

At the next meeting this question could be examined in detail.

The proposals of the President were adopted and it was agreed to meet again at 4 p. m.

(The meeting rose at 12.40 p. m.)

SECOND MEETING (PUBLIC)

HELD ON WEDNESDAY, SEPTEMBER 4TH, 1929, AT 4 P. M.

President: Jonkheer W. J. M. VAN EYSINGA.

8. *Question of the accession of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice: Adoption of the Draft Protocol prepared by the Committee of Jurists.*

The PRESIDENT proposed that the Conference should examine the question of the accession of the United States of America to the Protocol of Signature of the Statute of the Court.⁴ He thought that everyone would be glad to hear a statement by the Rapporteur of the Committee of Jurists for that question. He asked Sir Cecil Hurst to say a few words on this subject.

Sir CECIL HURST (British Empire) assumed that his colleagues did not want any elaborate explanation of the contents either of the report of the Committee of Jurists or of the draft Protocol. He felt sure that all the members of the Conference would have studied the report and made themselves acquainted with the contents of the draft Protocol. Possibly, all he needed to add were some small explanations that might be helpful to the members of the Conference in deciding upon the attitude they would adopt.

It was true that his name appeared in the report as Rapporteur; but those who were members of the Committee of Jurists knew quite well that, although he had prepared the rough draft of the report before it was presented to the Committee, it had been very carefully revised in collaboration with Mr. Root himself. The members of the Committee of Jurists had felt that, in framing the scheme which they hoped would enable the United States to adhere to the Court, they were dealing with a question which was of particular interest to the United States member of that Committee. It was, therefore, not unnatural that they should have endeavoured to ensure that the terms of the report which was submitted to the Committee should have the full concurrence of the United States member of the Committee, even though he might not be the Rapporteur.

Sir Cecil Hurst was aware that many of the members of the present Conference had been present at the previous Conference in 1926. Those

⁴ *Infra*, p. 349.

members would remember that the great difficulty with which they had then been faced was the reservation included by the United States as part of the fifth paragraph of their reserves:

"Nor shall it [*i.e.*, the Court] without the consent of the United States entertain any request for any advisory opinion touching any dispute or question in which the United States has or claims an interest."

In 1926, the Conference, being deprived of the active participation of a representative of the United States in its work, had been unable to find a satisfactory method of overcoming the particular difficulty by which the League was at that time confronted. It was only at a later stage that it had become possible to understand what was the position, what was the difficulty that underlay the United States' desire to secure the acceptance of that reservation, what it was exactly that underlay the hesitation displayed on the European side of the Atlantic in the acceptance of that reserve. It had then become clear that what really was at the bottom of that reserve was, on both sides, a little fear as to the effect which acceptance might have. There was on the one side, he thought on the side of the United States, a feeling, when the reservation had been framed, that, through the machinery of the Court and by asking the Court for its opinion in any advisory capacity, cases might be dealt with which really affected the interests of the United States.

As the Committee of Jurists said in their report:

"The discussions in the Committee have shown that the conditions with which the Government of the United States thought it necessary to accompany the expression of its willingness to adhere to the Protocol establishing the Court owed their origin to apprehension that the Council or the Assembly of the League might request from the Court advisory opinions without reference to interests of the United States which might in certain cases be involved."

There had been some hesitation, as was shown in that paragraph, on the part of the United States; but there had also been some hesitation on the part of the Members of the League.

Again, the report says:

"Those discussions have also shown that the hesitation felt by the delegates to the Conference of 1926 as to recommending the acceptance of those conditions was due to apprehension that the rights claimed in the reservations formulated by the United States might be exercised in a way which would interfere with the work of the Council or the Assembly and embarrass their procedure."

It was in face of that mutual want of confidence on both sides that, when the Committee of jurists met in March 1929, Mr. Root had made the very helpful suggestion that the real way of bridging the difficulty was to ensure some method by which the two parties would be put in contact so that, if a question arose in the Council regarding which any Government desired to secure the advisory opinion of the Court, there might be some method

through mutual direct contact, by which the League could assure the United States, and the United States on the other hand could assure both itself and the Council, that there was no intention to prejudice in any way the interests of the other party.

Mr. Root's real contribution to the work in March had been embodied in another paragraph of the report:

"Furthermore, mature reflection convinced the Committee that it was useless to attempt to allay the apprehensions on either side, which have been referred to above, by the elaboration of any system of paper guarantees or abstract formulæ. The more hopeful system is to deal with the problem in a concrete form, to provide some method by which questions as they arise may be examined and views exchanged, and a conclusion thereby reached after each side has made itself acquainted with the difficulties and responsibilities which beset the other. It is this method which the Committee recommends should be adopted, and to provide for which it now submits a text of a Protocol to be concluded between the States which signed the Protocol of 1920 and the United States of America."

He would also venture to read the next sentence, because that, again, from the point of view of the members of the Conference, was a very important one:

"The note of February 19th, 1929, from the Secretary of State of the United States makes it clear that the Government of the United States has no desire to interfere with or to embarrass the work of the Council or the Assembly of the League, and that that Government realises the difficulties and the responsibilities of the tasks with which the League is from time to time confronted. It shows that there is no intention on the part of the United States Government of hampering, upon unreal or unsubstantial grounds, the machinery by which advisory opinions are from time to time requested. The Committee is thereby enabled to recommend that the States which signed the Protocol of 1920 should accept the reservations formulated by the United States upon the terms and conditions set out in the articles of the draft Protocol. This is the effect of Article 1 of the draft now submitted."

There lay the real explanation of the proposal that was before the Conference, namely, that it should secure the acceptance by the United States of the Statute of the Court because it was in a position to accept the United States reservations, just as the United States was in a position to assure itself that no prejudice to its interests was possible in requests by the League for advisory opinions from the Court, because both parties saw that this simple method of getting in touch for the discussion of any question was bound to ensure an arrangement satisfactory to both.

Such was in reality the essence of the proposal now submitted.

The machinery by which this result was to be achieved was provided for in the terms of the Protocol. With goodwill on both sides there would be no difficulty whatever in finding the appropriate channel of communication; that communication might be effected through a diplomatic channel or

directly, or it could be effected by local representatives. With goodwill, there was and could be no difficulty.

The very gratifying communication which had been made to the Conference that morning proved, he thought, that the Government possibly most interested in the question was prepared to accept the scheme as it had been laid before the Conference. That being so, he could only trust that the Governments which were represented at the Conference would likewise find that the scheme which had been laid before it was adequate for their purpose. Most of the delegates were lawyers, and it was the habit—he was almost tempted to say the bad habit—of a lawyer whenever he read a document to think that he could see possible improvements in it. He had no doubt that most of the members of the Conference thought so on the present occasion. In view, however, of the communication made at the morning meeting, he would express the hope that it would not be necessary to make any modifications.

The PRESIDENT thanked Sir Cecil Hurst for his statement.

M. FROMAGEOT (France) wished merely to state that they had heard with deep satisfaction that morning the communication made to them by the Secretary-General of the League of Nations with regard to the Protocol and the opinion of the Government of the United States. In the light of that communication, and after hearing the remarks of his British colleague, he thought he might say that, subject to ratification, he could sign the Protocol on behalf of the French Government without any alterations.

M. PILOTTI (Italy) associated himself with M. Fromageot's statement. On behalf of the Italian Government he was prepared to sign the Protocol as it stood.

Sir George FOSTER (Canada) said that the present situation was a source of great satisfaction to him, as a member of the 1926 Conference, which had had under consideration the resolutions of the United States Senate and its reservations. Difficulties had been encountered at that time, but the work and the result of the work of the Conference had by no means proved a failure; it was the inevitable first step which had necessarily to precede ultimate achievement.

He had listened to the statement of Sir Cecil Hurst, and he thanked him for the candid and frank confession he had made with reference to the peculiar temperament and disposition of the legal fraternity. At first he had thought of suggesting that the laymen should have a turn that afternoon and that the lawyers should be satisfied with the laurels won in previous well-contested fields; but now that the lawyers themselves had made that approach it would be a good thing for the laymen to join hands with them, thanking them for all the help they had given, refreshed by the frank confession they had made, and feeling sure that in years to come, chastened by this experience, they would come to the assistance of the laymen in all such progressive and helpful efforts for the establishment of peace.

The whole kernel of the trouble, as had been explained, had simply been lack of contact and conference. If there had not been such lack of contact and conference in 1926, three years' delay would probably have been saved.

In the presence of the document now before the Conference, which had been so carefully examined and by such an authority, there were only two things that could be done—accept its conclusions, or undertake a revision of them section by section and article by article. He personally would have the strongest objection to undertaking to dissect, tear up, and then patch up a document which had been so ably prepared, and which he considered to be excellent. He would have the strongest objection to such a procedure, even if it succeeded, because the document in question had received the imprimatur of a legal mind from the United States of America, which was in agreement with and which had assisted in the formation of this Protocol.

He did not think it was necessary for him to say anything in praise of Mr. Root. One observation alone he desired to make. Mr. Root stood pre-eminent in the United States without reference to party or to faction, and consequently when the League had the collaboration of a gentleman of such capacity and influence it would be a gratuitous if not a hazardous undertaking to disturb the conclusions which had been reached jointly with him, since it was certain that those conclusions, with the great influence of Mr. Root and his friends behind them, would have every chance of being accepted by the United States of America.

Coming as he did from a country which was a neighbour of the United States, a neighbour of the best pretensions and on the best grounds of friendship, he experienced great joy to find that (although later than had been hoped) there was now a good prospect of the United States of America, that large and populous neighbour of Canada, having a seat upon the Permanent Court and thus adding to its prestige and its influence.

For a hundred years there had been perfect peace and amity between those two countries of the North American Continent. The United States had been beside Canada long before the great war; it had been beside Canada through all that period of anxious anticipation and desire which preceded the entry of the United States into the war. Canada had been the neighbour of the United States and by its side ever since, always praying that, step by step, without compulsion, and from its own conscience and desire, that country would take a greater and greater part with Canada in the work of assuring world peace. 1926 and 1929! What a different situation existed now, not only in Europe, not only in other countries of the world, but, perhaps more than anywhere else, in the United States of America itself. That was another step forward towards the period when contact and conference would settle the affairs of the world and would bring about the certainty of ultimate peace.

On behalf of the Government which he represented, and in his personal capacity, he was glad to say that he accepted the Protocol as it stood, without alteration.

Prince VARNVAIDYA (Siam) declared that the Siamese Government had no amendments to propose. He was therefore prepared, on behalf of his Government, to accept the draft Protocol as it stood.

M. GÖPPERT (Germany) considered the draft Protocol to be wholly satisfactory and stated that the German Government could accept it.

M. OSUSKY (Czechoslovakia) said that, without considering whether the method proposed was the only one which might solve the problem or was indeed the best solution, the Czechoslovak Government was glad that a formula had been found to allow the accession of the United States to the Court of Justice and had instructed him to declare forthwith that he would sign the Protocol without modification.

M. ZUMETA (Venezuela) declared that the Venezuelan Government would sign the draft Protocol as it stood. He would, however, at a more propitious moment, submit certain additional considerations.

M. ANTONIADE (Roumania) said that the Roumanian Government welcomed the accession of the United States to the Protocol of Signature of the Statute of the Permanent Court at The Hague. He agreed with the draft Protocol as submitted and was ready to sign it.

M. DE BLANCK (Cuba) declared that his Government was also prepared to sign the draft Protocol.

M. SCHMIDT (Estonia) said that he was authorised by his Government to sign the draft Protocol without any alteration.

M. GORGÉ (Switzerland) said that the Swiss Government was also prepared, if all the members of the Conference agreed, to sign the draft Protocol as it stood.

He wished, however, in connection with Article 5, not to submit an amendment, but to ask Sir Cecil Hurst for an explanation.

Article 5 began as follows:

"With a view to ensuring that the Court shall not, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest, the Secretary-General . . ."

Was there not a contradiction—a textual if not a logical one—between that sentence and the last two paragraphs of the article? Cases might arise in which the Court would give effect to a request for an advisory opinion even when the consent of the United States had not been obtained.

He wondered whether the text would not be clearer if drafted thus, for instance:

"With a view to ensuring that the Court shall not, without having requested the opinion of the United States . . ."

There was no doubt as to the general interpretation to be given to the article, but he would like to have the opinion of the Rapporteur on the point to which he had referred.

Sir Cecil HURST (British Empire) said he trusted there was no such contradiction as his Swiss colleague feared. It must be remembered that the Conference was approaching a question of which the limits were somewhat dominated by the terms of the Senate resolution (Annex 3) which said in its fifth paragraph:

"That the Court shall not render any advisory opinion except publicly after due notice to all States . . . nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest."

It was desirable, for the satisfaction of public opinion in the various countries concerned, that the Conference should as far as possible make it clear that on the new basis provided for, that of actual contact, the Conference was in a position to accept the reserves made by the United States; that was to say, the conditions which were to be found in the Senate resolution. It was from that Senate resolution that the words had been taken which came at the beginning of Article 5, namely:

"With a view to ensuring that the Court shall not, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest . . ."

Up to that point the words were merely a quotation from the Senate resolution. It was in reality a method of saying: "For the purpose of giving satisfaction to the fifth condition embodied in the Senate resolution, the Secretary-General shall, through any channel designated for that purpose, inform the United States etc." This method ensured that there would be contact between the parties, so as to give satisfaction to that condition as laid down by the United States. If the result of the discussion were such as not to give satisfaction to the United States, it would be remembered that the United States had the power to withdraw if necessary.

Consequently, he did not think there was really any contradiction between the terms of that article and those of the remainder of the Protocol. The words to which importance had been attached by his colleague were merely a quotation from the Senate resolution.

M. GORGÉ (Switzerland) said that he was entirely satisfied with Sir Cecil Hurst's very clear explanations.

The representatives of SWEDEN, AUSTRALIA, DENMARK, CHILE, BELGIUM and BULGARIA expressed the willingness of their Governments to sign the draft Protocol in the form submitted.

M. BOTELLA (Spain) observed that the adoption of the Protocol by the Council, on which Spain was represented, sufficed to demonstrate the Spanish Government's opinion with regard to the report of the Committee of Jurists.

Sir William GREAVES (India) said he desired to make the same declaration on behalf of the Government of India. India was a country to which the rule of law was dear, and it was a great pleasure to his country that the United States of America was prepared to declare its adherence to the Protocol establishing the Court on the terms of the draft which was being considered by the Conference that afternoon.

M. RUNDSTEIN (Poland) said he was happy to be able to state, on behalf of his Government, that Poland would accept the Protocol without any change. He would venture to repeat the phrase which terminated Sir Cecil Hurst's noteworthy report, namely, that:

"With the acceptance of the Protocol, further progress had been made in establishing the reign of law among the nations of the world and in diminishing the risk that there might be a resort to force for the solution of their conflicts."

M. CHOUMENKOVITCH (Yugoslavia) made the same declaration on behalf of the Yugoslav Government, which was prepared to sign the draft Protocol in the form in which it had been submitted to the Conference.

The PRESIDENT said that, unless he was mistaken, the Conference was unanimous, since he himself could vouch for the approval of the Netherlands.

As the delegate for Canada had very aptly pointed out, very considerable progress had been made in the last three years. What action should be taken on this unanimous vote?

The Council had referred the matter to the Conference on the assumption—he referred to the Council resolution—that the recommendations of the Jurists would be approved by the Assembly. The First Committee of the Assembly, and then the plenary meeting of the Assembly, had, so to speak, left the matter to the Conference and asked it to express an opinion in the first place.

That being so, he thought the only possible course was to refer the matter back to the First Committee, informing the Chairman of that Committee of the result of the discussions of the Conference and at the same time communicating that result to the President of the Assembly.

M. ROLIN (Belgium) wondered whether it was desirable to divide the results of the work into two parts. That morning the delegate of Cuba had pointed out to the Conference something which, even if it were not an obstacle, might prove to be a difficulty, if the President's suggestion was followed.

If the United States was officially informed of the signature of the Protocol—for he supposed that that was the intention—before the Statute had been revised, in other words, before the United States could be notified that the revision carried out in agreement with Mr. Elihu Root had also been approved, it might be found that the United States had acceded to the Protocol without any reference to the amendments to the Statute which would thus, for the time being, remain suspended in mid-air.

Would there be any objection to deferring the reply for some days and awaiting the close of the Conference, so that the Council might inform the Government of the United States of the approval of the Conference both of the Protocol and of the new Statute? Personally, he was in favour of that procedure.

M. PILOTTI (Italy) said he was not sure that M. Rolin's objection was justified. It was not for the members of the Conference to sign the Protocol. The Conference was not the Assembly; it was only a Conference of State Members of the Court. It could only say that it had examined the draft Protocol and had found no objections to it. The First Committee of the Assembly could then go on with its work, unless it discovered any objections of its own.

For the present, however, the Conference could form no opinion as to the final results. All the members were convinced that their—or their Governments'—signatures were necessary, but it was not yet time to affix them. The United States could only accede to the Protocol when the members of the Conference had completed their work, and they would certainly not affix their signatures to the Protocol until the Conference had disposed of its agenda.

M. YOSHIDA (Japan) said he shared the views of his Belgian colleague. He did not think that there was any objection on the part of the Japanese Government, but, so far, he had not received instructions. He was not, therefore, prepared to sign immediately.

The PRESIDENT said he understood that the Conference had been unanimous with regard to the Protocol. Had not the Japanese delegate voted in its favour?

M. YOSHIDA (Japan) replied that he had not voted in its favour, but did not vote against it.

The PRESIDENT observed that a number of delegates had not yet received full powers, but Japan was represented on the Council, and the fact that the Council had approved the Protocol seemed to prove that Japan had no objection to it.

M. YOSHIDA (Japan) said he presumed that his Government had no objection.

Sir Cecil HURST (British Empire) said he would like to address one question to the President of the Conference. M. Rolin's proposal troubled him a little because it seemed that there was one small point for which provision had still to be made. The effect of the draft Protocol was to impose a certain limitation on the method of work followed by the Council or by the Assembly of the League. Under the Covenant, both the Council and the Assembly had the right to ask the Court for advisory opinions, and in the terms of the Covenant there was no limitation upon the powers of the Council and of the Assembly to ask for those opinions. Now, the effect of the draft Protocol, if it were accepted by all the parties concerned, would be to

impose some small limitation upon the right of the Council and of the Assembly in the matter of asking for advisory opinions, because, in those cases where there was a possibility of the interests of the United States being affected, there would be a preliminary interchange of views with the United States before that opinion was asked for from the Court.

He understood, however, that the draft Protocol, before it was submitted to the Conference, had been approved by the Council. That approval by the Council intimated that, so far as the Council was concerned, it was prepared to accept that small limitation upon its powers. He thought, however, that there was still one technical step to be taken: the Assembly for its part must accept the draft Protocol in order to signify its acceptance of such limitation upon its powers of asking for an advisory opinion. If that view were right, he felt that the step of referring the draft Protocol, as accepted by the Conference, back to the Assembly or the First Committee—he treated them as one for that purpose—was a step that had to be taken quite irrespective of signature. He therefore thought it desirable not to wait, as M. Rolin had suggested, but to send it as soon as possible to the Assembly in order that the latter might play its part in the general acceptance, the bringing into force of the whole scheme.

M. ROLIN (Belgium) did not wish to prolong a formal discussion such as that which had taken place at the morning meeting, but he would point out that the importance of informing the First Committee of the results of the first part of the work of the Conference, to which M. Pilotti had referred, was not very great.

As regards the amendments to the Statute, the position was the same. In this case, also, the approval of the Assembly was necessary, since the Court was the Court of the League as well as of the States. In these circumstances, there was no more reason to go at once before the Assembly than to complete the work of the Conference and then go before it. The only point which seemed to M. Rolin to be important, and which he had raised at the morning meeting after hearing the statement by the Cuban delegate, was that, contrary to what some of the members had thought, the Conference was acting imprudently in giving an official and final character to the approval by the members of the League of the draft Protocol, while the approval of the Statute as amended by the States and by the League was not yet final. Such a procedure might cause the United States Government or Senate to take a decision regarding the existing Statute and the Protocol, whereas they were asked to take a decision on the amended Statute and the Protocol. These considerations could be examined later, and, if the majority of the Conference then desired to transmit the decision of the Conference to the First Committee, he would raise no objection.

The PRESIDENT remarked that he had intended to draw M. Rolin's attention to the same points which Sir Cecil Hurst had put forward. The Assembly had still to be consulted before the slightly modified procedure

regarding advisory opinions contemplated for the United States became an accepted fact. Since the First Committee had worked with such speed, the Conference would perhaps be well inspired to follow its example. As M. Rolin had pointed out, there would be a certain element of uncertainty until all the questions had been settled. That was inevitable. He thought, however, that, since an opinion had been given by the Conference, it would be desirable to transmit that opinion to the Assembly immediately in order that the First Committee and the Assembly might reach a decision regarding the slight variation in procedure embodied in the Protocol. If M. Rolin did not insist, and if no other objection were raised, that course might, he thought, be adopted.

*The President's proposal was adopted.*⁵

The PRESIDENT observed that the Conference had thus completed the first point on their agenda. He proposed that before it considered the other item—the problem of the revision of the Statute—it should adjourn for a few minutes.

(The meeting was adjourned at 5.30 p.m. and resumed at 6 p.m.)

LETTER DATED SEPTEMBER 5TH, 1929, FROM THE PRESIDENT OF THE CONFERENCE TO THE PRESIDENT OF THE ASSEMBLY AND TO THE CHAIRMAN OF THE FIRST COMMITTEE.

[Translation.]

The Conference which has been invited to deal, among other questions, with the question of the accession of the United States of America to the Statute of the Permanent Court of International Justice, has accepted unanimously and without alteration the draft Protocol on this matter drawn up by the Committee of Jurists which met last March (see Annex 5, Appendix).

I have the honour to inform you that the Conference has decided to refer the said Protocol to the First Committee of the Assembly in order that the latter may be in a position to take the concurrent action of itself finally adopting this Instrument.

(Signed) VAN EYSINGA,
President of the Conference.

REPORT OF THE FIRST COMMITTEE TO THE ASSEMBLY¹

Rapporteur: M. POLITIS (Greece).

After the resolution adopted by the Senate of the United States on January 27th, 1926, with regard to the adherence of the United States to the

⁵ The text of the letter sent by the President of the Conference to the President of the Assembly and to the Chairman of the First Committee is reproduced above.

¹ Sept. 13, 1929. Series of League of Nations Publications V. Legal 1929. V. 15. Official No. A.49. 1929. V.

Protocol of Signature of the Statute of the Permanent Court of International Justice of December 16th, 1920, a Conference of the Signatories of the said Protocol was held at Geneva in September 1926, for the purpose of considering how effect might be given to the reservations and understandings embodied in the Senate resolution. The conference of 1926 prepared the draft of a Protocol which it was believed would meet all the requirements of the situation, but unfortunately the Government of the United States, which had not been represented in the Conference, did not see its way to accept the Protocol.

On February 19th, 1929, the Government of the United States intimated by means of a note addressed to all the interested parties that an exchange of views might lead to an agreement with regard to the conditions upon which the United States desired to adhere to the Statute of the Court. Arrangements were accordingly made by the Council of the League that the Committee of Jurists which it had appointed in pursuance of the resolution of the Assembly dated September 20th, 1928, on the subject of the examination of the Statute of the Court to see whether any amendments were necessary, should deal also with the question raised by the note from the United States Government and should make any suggestions which it felt able to offer with a view to facilitating the accession of the United States on conditions satisfactory to all the interests concerned.

It was of the greatest assistance to the Committee in the accomplishment of this additional task that among its members was to be found the Honourable Elihu Root, formerly Secretary of State of the United States, and one of the members of the Committee which in 1920 framed the original draft of the Statute of the Court. His presence in the Committee enabled it to re-examine with good results the work accomplished by the Special Conference which met in 1926. The note from the United States Government to which reference is made above had shown that the margin of difference between the requirements of the United States and the recommendations made by the Special Conference was not great. For this reason, the Committee of Jurists adopted as the basis of its discussions the preliminary draft of a Protocol which was annexed to the Final Act of that Conference and introduced into it the changes which it believed were necessary in order to overcome the objections encountered by the draft of 1926 and to render it acceptable to all parties.

The revised draft Protocol was submitted to the Council of the League and adopted by that body at its session at Madrid on June 12th, 1929. It was placed on the agenda of the present session of the Assembly and also, in consequence of a resolution of the Council of August 31st, 1929, upon that of the Conference convened to consider the revision of the Court's Statute. This Conference has now informed the Assembly that the text of the Protocol has been approved by all the Governments represented in the Conference and that there is every reason to believe that it will meet with unanimous accept-

ance. It is necessary, however, that the Protocol should be formally approved by the Assembly of the League before it is opened for signature, as the agreement which it embodies will affect the right of the Assembly to ask for an advisory opinion from the Court.

No difficulty has at any time been felt with regard to the acceptance of the conditions laid down by the United States in the Senate resolution of January 27th, 1926, except in so far as they relate to advisory opinions. A simple solution of these difficulties would have been found had it been possible to agree that the system of asking the Court for an advisory opinion upon any particular question should be abandoned altogether. So drastic a solution, however, is not at present feasible. The system of asking the Court for an advisory opinion has proved to be of substantial utility in securing a solution of questions which could not conveniently be submitted to the Court in any other form. It has also on occasions enabled the parties to a dispute to ask for the submission of their differences to the Court in the form of a request for an advisory opinion when they were for various reasons unwilling to submit them in the form of international litigation.

Another method by which satisfaction might easily have been given to the conditions laid down by the United States would have been that of adopting a rule that in all cases a decision on the part of the Council or of the Assembly to ask for an advisory opinion from the Court must be unanimous. As was pointed out in the Final Act of the Special Conference of 1926, it is not possible to say with certainty whether a decision by a majority is not sufficient. On this point, all that is possible is to guarantee to the United States a position of equality with the States which are represented in the Council or the Assembly of the League.

The investigation of the whole subject which was made by the Committee of Jurists showed that the conditions with which the Government of the United States thought it necessary to accompany the expression of its willingness to adhere to the Protocol establishing the Court owed their origin to apprehension that the Council or the Assembly of the League might request from the Court advisory opinions without reference to the interests of the United States, which might in certain cases be involved. Those discussions also showed that the hesitation felt by the delegates to the Conference of 1926 as to recommending the acceptance of those conditions was due to apprehension that the rights claimed in the reservations formulated by the United States might be exercised in a way which would interfere with the work of the Council or the Assembly and embarrass their procedure.

The system of asking a judicial tribunal for advisory opinions is one which does not exist at all in the Constitution of the United States of America, and it is not unnatural that some misapprehension should be entertained in that country as to the rôle which the Permanent Court of International Justice fulfils in giving advisory opinions on questions submitted to it by the Council or the Assembly of the League. The procedure followed by the

Court in dealing with the questions submitted to it for an advisory opinion is in fact almost identical with the procedure which is followed in dealing with contentious cases.

Misapprehension appears also to exist in the United States as to the powers of the Council to give effect to the opinions rendered by the Court on questions submitted to it by the Council or the Assembly. It has, for instance, been suggested that the provisions of the concluding paragraph of Article 13 of the Covenant would enable the Council to oblige the Members of the League to resort to war for the purpose of enforcing such an opinion.

This view is erroneous. The last paragraph of Article 13 relates only to awards or decisions, not to advisory opinions. Advisory opinions are given by the Court at the request only of the Council or the Assembly of the League and in general only for the purpose of guiding the organs of the League or the International Labour Office in questions which come before those bodies in the execution of their duties. They are opinions only and in theory are not binding. Even in cases where an advisory opinion was asked for by the Council or the Assembly at the request of individual States which preferred to submit their disputes to judicial settlement through the machinery of an advisory opinion rather than by direct submission to the Court, the powers of the Council would not go beyond its general duty of securing respect for treaty engagements by ensuring that parties which submit their dispute for decision by a tribunal shall execute in good faith the decision which may be rendered. The power of the Council under Article 13, paragraph 4, in connection with awards or judicial decisions, is limited to "*proposing*" measures for the purpose of giving effect to them. It cannot do more. It certainly could not oblige States to take measures which would violate their treaty engagements.

The discussions which took place in the Committee of Jurists showed that it was useless to attempt to allay the apprehensions on either side referred to above by the elaboration of any system of paper guarantees or abstract formulæ. The only satisfactory method would be to deal with the problem in a concrete form, to provide some method by which the parties might be brought into contact so that questions as they arise might be examined and views exchanged and a conclusion thereby reached after each side had made itself acquainted with the difficulties and responsibilities which beset the other. This is the method which the Committee recommended should be adopted and to provide for which it submitted the text of a Protocol to be concluded between the States which signed the Protocol of 1920 and the United States of America. This view has been endorsed by the Conference which has recently concluded its labours, and the First Committee now recommends that it should be adopted by the Assembly.

The note of February 19th, 1929, from the United States has made it clear that that Government has no desire to interfere with the work of the Council or the Assembly of the League and that there is no intention on the

part of that Government to hamper, upon unreal or unsubstantial grounds, the machinery by which advisory opinions are from time to time requested. This rendered it possible for the Committee to recommend that the States which signed the Protocol of 1920 should accept the reservations formulated by the United States upon the terms and conditions set out in the articles of the draft Protocol which the Committee prepared and which is now annexed to this report.² The important article is No. 5, which provides machinery by which the United States will be made aware of any proposal before the Council or the Assembly for obtaining an advisory opinion and will have an opportunity of indicating whether the interests of the United States are affected, so that the Council or the Assembly, as the case may be, may decide its course of action with full knowledge of the position. It may be expected that the exchange of views so provided for will be sufficient to ensure that an understanding will be reached and no conflict of views will remain.

The provisions of this Article have been worded with due regard to the exigencies of business in the Council of the League. The desirability of obtaining an advisory opinion may only become apparent as the session of the Council is drawing to a close and when it may not be possible to complete the exchange of views before the members of that body separate. In that case, it will be for the Council to give such directions as the circumstances may require, in order to ensure that the intentions of the article are carried out. The request addressed to the Court may, for instance, be held up temporarily, or it may be despatched with a request that the Court will nevertheless suspend action on the request until the exchange of views with the United States has been completed. The provisions of the Article have purposely been framed so as to afford a measure of elasticity in its application. Similarly, if the Court has commenced the preliminary proceedings consequent upon the receipt of the request for an advisory opinion and has given notice of the request to the United States in the same way as to the other Governments, the proceedings may, if necessary, be interrupted in order that the necessary exchange of views may take place. What is said in this paragraph with regard to requests for advisory opinions made by the Council would also apply to requests by the Assembly in the event of the Assembly making any such request.

The provisions of this Article should in practice afford protection to all parties in all cases; but, if they do not, it must be recognised that the solution embodied in the present proposal will not have achieved the success that was hoped for and that the United States would be fully justified in withdrawing from the arrangement. It is for this eventuality that provision is made in the last paragraph of the Article. It may be hoped that, should any such withdrawal by the United States materialise, it would in fact be followed or accompanied by the conclusion of some new and more satisfactory arrangement.

² See Protocol of Accession, *infra*, p. 349.

In order to ensure so far as possible that the parties to the Protocol of 1920 shall be identical with the parties to the new Protocol, Article 6 provides that any State which in future signs the Protocol of 1920 shall be deemed to accept the new Protocol.

The remaining provisions of the draft Protocol do not call for detailed comment, because they are in substance similar to the corresponding provisions of the draft Protocol of 1926.

For these reasons the First Committee submits the following resolution to the Assembly:

“The Assembly adopts the draft Protocol relating to the adherence of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice.”

It is understood that, if this resolution is adopted by the Assembly, the Secretary-General will proceed forthwith to open the Protocol for signature.

TENTH ORDINARY SESSION OF THE ASSEMBLY OF THE
LEAGUE OF NATIONS

FOURTEENTH PLENARY MEETING

Held on Saturday, September 14, 1929, at 3.30 p. m.¹

* * * * *

- 49.—I. *Revision of the Statute of the Permanent Court of International Justice: Report of the First Committee: Resolutions.* II. *Question of the Adherence of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice: Report of the First Committee: Resolution.*

The PRESIDENT:

Translation: The next item on the agenda is the First Committee's report on the Revision of the Statute of the Permanent Court of International Justice (Annex 4, document A. 50. 1929. V).²

(*On the invitation of the President, M. Limburg, Vice-Chairman of the First Committee, and M. Politis, Rapporteur, took their places on the platform.*)

M. POLITIS, Rapporteur, will address the Assembly.

M. POLITIS (Greece), Rapporteur:

Translation: Mr. President, ladies and gentlemen—It is my privilege, on behalf of the First Committee, to give you an account of the latter's work with reference to the accession of the United States of America to the Statute of the Permanent Court of International Justice and the revision of that Statute.

* * * * *

I propose to deal first with the question of the accession of the United States to the Statute of the Court.

Although, as you are aware, a judge from the United States has been a member of the Court from the outset, the Court has not hitherto enjoyed the coöperation of the United States Government—not, I hasten to add, because that great country, which is among the foremost champions of international justice, was opposed to the institution set up by the League in 1920, but because, not being a Member of the League, it rightly considers that it cannot accede to the Statute of the Court without certain guarantees which would necessitate an international agreement between the United States and the States which have already acceded to the Court.

The Senate, in a resolution dated January 27th, 1926, explained, as you know, how the United States interprets these guarantees.

A Conference of States signatories to the Protocol of Signature of the Statute of the Court was held at Geneva in September 1926, to consider the

¹ Records of the Tenth Assembly, League of Nations Official Journal, Special Supplement No. 75, pp. 114-116, 122.

² *Ibid.*, pp. 433-440. Omitted from these Proceedings.

practical means of satisfying the United States reservations. As everyone knows, the Conference framed a draft Protocol which, unfortunately, was not acceptable to the United States. Disagreement thus existed—that was the main result of the Conference—between the United States and the other States concerned, though in point of fact it concerned one point only—the question of advisory opinions for which the Council and the Assembly can apply, under the Covenant, to the Permanent Court of International Justice. I feel perfectly sure that that disagreement was really due to a misunderstanding, arising—we must be frank—from a mutual lack of confidence.

The United States Government, in fact, feared lest the Council or the Assembly might ask the Court for an advisory opinion without reference to any interests that the United States might have in the question at issue, while the other States, the States concerned, feared lest the rights claimed by the United States in its reservations might be so exercised as to hamper the League's activities and its work in general.

For some time this misunderstanding persisted, and for some time, too, there appeared to be no hope of reaching a solution. But time, as the Italian proverb says, can be depended on, and time, too, brings good counsel. It allows of reflection, and reflection led both sides ultimately to realise that the fears revealed in 1926, after the Conference of that year, were quite unfounded and that, with a further effort to mutual goodwill, it should be possible to find a formula to allay the apprehensions of both parties.

Such reflection led to the communication from the United States Secretary of State to which I have just referred and of which the Council of the League took cognisance in March of this year. This note made it possible to re-open the examination of the question. It made it quite clear that the United States has no desire to interfere with the League's work or to hamper it in any way, and further that the United States Government fully realises the responsibilities, frequently heavy, which may rest upon the Council and upon the Assembly of the League. The note showed that, in the opinion of the United States Government, the margin of difference between the United States reservations and the draft Protocol framed in 1926 was not so great that it could not be overcome by means of a frank exchange of views.

The Committee of Jurists appointed to consider the question on this basis accordingly had no difficulty in drafting a formula, in full agreement with the member from the United States, which was found quite satisfactory. This it did by facing the difficulty boldly and endeavouring to overcome it in a concrete way and in the best interests of all the parties concerned. It took account of the fact that, in a country where the Supreme Court has no advisory powers, some misapprehension may be entertained as to the real part played by the Permanent Court of International Justice when asked by the League for an advisory opinion.

To remove all apprehension on this point, it is sufficient to note—as is noted in the texts before you—that the procedure followed by the Court in its

advisory capacity is almost identical with that which is followed in contentious cases.

Another misapprehension appears to exist in the United States as to the powers of the Council under the last paragraph of Article 13 of the Covenant, to the effect that, in virtue of this provision, the League Council, after obtaining an advisory opinion from the Court, might require Members of the League to resort to war if necessary for the purpose of enforcing that advisory opinion.

Before an audience familiar with the provisions of the Covenant, it is hardly necessary for me to urge that this view is quite erroneous. Article 13 does not and cannot refer to advisory opinions. Advisory opinions have, in theory, no binding force. The last paragraph of Article 13 relates only to awards and decisions, and even in such cases the Council has no power to impose anything on anybody; its power is limited to proposing measures which it will be for Members to carry out subsequently with a view to enforcing the decision. It is quite inconceivable, however, that, in connection with any advisory opinion, the Council should propose that Members of the League should take measures contrary to their international engagements.

I think these very brief and very simple explanations will remove any misapprehension on this point.

Thus, after making a detailed analysis of the position, and taking into account the state of mind of the countries concerned, the Committee succeeded, by the method which I have just described, in finding the desired formula.

This is so simple that, now that we have it before us, the remarkable thing is that it should have taken so many years to find.

It consists in guaranteeing to the United States, in everything relating to the Court, its Statute, organisation, and functions, the position that country would have had as a Member of the League of Nations with a permanent seat on the Council.

For practical purposes this general outline of the draft Protocol before you may be divided into four main provisions.

The first is that the United States shall participate in the elections of judges of the Court through representatives at the Assembly and in the Council on a basis of equality with States Members of the League represented in the Assembly or in the Council.

The second is that no amendment of the Statute may be made without the consent of the United States equally with that of other States concerned.

The third concerns the contractual character to be given henceforth—this idea is further emphasised by the foregoing provision concerning amendments—to the present provisions of the Rules of Court governing the procedure for advisory opinions.

Then comes the fourth and last provision, the most important of all and

the one which necessitated so much discussion and research. The United States will participate, upon a basis of equality with the States Members of the League represented at the Assembly and on the Council, in any decision to request the Court for an advisory opinion, when the interests of the United States are affected.

Article 5 of the draft Protocol before you governs the procedure to be followed in such a case. It is purposely framed with elasticity and a lack of rigidity so as to cover any circumstances whatsoever that may arise in the future.

Whenever the Council or the Assembly intends to apply to the Court for an advisory opinion on a given question and has reason to believe, or is informed, that the United States considers that its interests are involved, the United States will participate in the decision to apply to the Court, exactly as if it also were a Member of the League with a permanent seat on the Council. Its vote will have the same value as that of States Members of both organs of the League.

In practice, this implies that, if unanimity is required, when applying for an advisory opinion on any matter, and if the United States is opposed to application being made, the request cannot go forward.

It also implies that, if a majority is sufficient—as it is when the Assembly asks for an opinion—the opposition of the United States, being simply equivalent to the vote of a Member of the Assembly, would count when determining the majority; but if the majority is secured notwithstanding such opposition, the request would go forward and the procedure of the League would follow its course.

The opposition of the United States, in a question in which that country maintains that its interests are involved, obviously cannot be negated or cancelled by the ordinary procedure of the Assembly. And while the United States had to recognise that the Assembly's procedure must follow its course, we for our part had to recognise that the United States must be free to denounce the agreement, to withdraw its accession to the Statute, in any matter in which the League's machinery might involve a request for an opinion notwithstanding the opposition of the United States.

These extreme cases, which I personally regard as purely hypothetical, made it necessary to maintain perfect equality between the contracting parties, and the draft Protocol before you provides accordingly that any contracting party shall be entitled at any time to withdraw its acceptance of the Protocol and that, if, during the year following the first withdrawal, two-thirds of the contracting States adopt the same course, the Protocol shall cease to be in force.

If, despite my optimism, such a contingency ever arose, I still persist in the belief that the United States would immediately come to an agreement with the States concerned, with the object of concluding a new Protocol better adapted to requirements as shown by experience.

The draft Protocol of which I have just given this brief analysis has been unanimously approved by the Committee of Jurists, the Council, the Conference and the First Committee. It has been favourably received in the United States, and we may thus assume that the Government of the United States regards it as satisfactory.

The Assembly, I am sure, will also approve it. It will look on this draft Protocol as fully safeguarding the League's rights and interests, and will take the view that, once it has received the Assembly's approval, all the States concerned will sign immediately and ratify without delay.

We shall thus have yet another proof that no problem, however difficult and complex at first sight, need really baffle us if studied in the League's characteristic spirit of conciliation and goodwill.

* * * * *

II. Question of the Adherence of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice: Report of the First Committee: Resolution.

The PRESIDENT:

Translation: The next item on the agenda is the question of the adherence of the United States of America to the Protocol of Signature of the Statute (Annex 5, document A. 49. 1929. V.)³

The text of the draft resolution proposed by the First Committee reads as follows:

The Assembly adopts the draft Protocol relating to the adherence of the United States of America to the Protocol of Signature of the Statute of the Permanent Court of International Justice.

As no one has asked to speak, I shall consider the resolution adopted.

The resolution was adopted.

I think I shall be interpreting the feeling of all present if I call special attention to the gratifying success of the important work which has thus been carried out on parallel lines by the Conference and the Assembly. The two Protocols adopted fulfil the conditions necessary to enable them to be signed without delay.

In conformity with the intentions of the Conference and the Assembly, the Secretary-General has taken the necessary steps to enable these documents to be ready for signature by the delegations at once and in this building—that is to say, in the President's room.

³ *Supra*, p. 338.

PROTOCOL OF ACCESSION OF THE UNITED STATES OF
AMERICA TO THE PROTOCOL OF SIGNATURE OF
THE STATUTE OF THE PERMANENT COURT
OF INTERNATIONAL JUSTICE¹

Signed at Geneva, September 14, 1929

PROTOCOL

The States signatories of the Protocol of Signature of the Statute of the Permanent Court of International Justice, dated December 16th, 1920, and the United States of America, through the undersigned duly authorised representatives, have mutually agreed upon the following provisions regarding the adherence of the United States of America to the said Protocol subject to the five reservations formulated by the United States in the resolution adopted by the Senate on January 27th, 1926.

ARTICLE 1

The States signatories of the said Protocol accept the special conditions attached by the United States in the five reservations mentioned above to its adherence to the said Protocol upon the terms and conditions set out in the following Articles.

ARTICLE 2

The United States shall be admitted to participate, through representatives designated for the purpose and upon an equality with the signatory States Members of the League of Nations represented in the Coun-

PROTOCOLE

Les Etats signataires du Protocole de signature du Statut de la Cour permanente de Justice internationale du 16 décembre 1920, et les Etats-Unis d'Amérique, représentés par les soussignés dûment autorisés, sont convenus des dispositions suivantes, relativement à l'adhésion des Etats-Unis d'Amérique audit Protocole sous condition des cinq réserves formulées par les Etats-Unis dans la résolution adoptée par le Sénat le 27 janvier 1926.

Article premier

Les Etats signataires dudit Protocole acceptent, aux termes des conditions spécifiées dans les articles ci-après, les conditions spéciales mises par les Etats-Unis à leur adhésion audit Protocole et énoncées dans les cinq réserves précitées.

Article 2

Les Etats-Unis sont admis à participer, par le moyen de délégués qu'ils désigneront à cet effet et sur un pied d'égalité avec les Etats signataires, Membres de la Société des Nations, représentés, soit au

¹ Reprinted from photostat of copy certified by the Secretary-General of the League of Nations, Dec. 11, 1929 (Official No. C.493. M.157.1929.V), and transmitted by the President of the United States to the Senate, Dec. 10, 1930. (See the President's message of transmittal in Supplement to this JOURNAL, January 1931, p. 49.)

cil or in the Assembly, in any and all proceedings of either the Council or the Assembly for the election of judges or deputy-judges of the Permanent Court of International Justice, provided for in the Statute of the Court. The vote of the United States shall be counted in determining the absolute majority of votes required by the Statute.

ARTICLE 3

No amendment of the Statute of the Court may be made without the consent of all the Contracting States.

ARTICLE 4

The Court shall render advisory opinions in public session after notice and opportunity for hearing substantially as provided in the now existing Articles 73 and 74 of the Rules of Court.

ARTICLE 5

With a view to ensuring that the Court shall not, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest, the Secretary-General of the League of Nations shall, through any channel designated for that purpose by the United States, inform the United States of any proposal before the Council or the Assembly of the League for obtaining an advisory opinion from the Court, and thereupon, if desired, an exchange of views as to whether

Conseil, soit à l'Assemblée, à toutes délibérations du Conseil ou de l'Assemblée ayant pour objet les élections de juges ou de juges suppléants de la Cour permanente de Justice internationale visées au Statut de la Cour. Leur voix sera comptée dans le calcul de la majorité absolue requise dans le Statut.

Article 3

Aucune modification du Statut de la Cour ne pourra avoir lieu sans l'acceptation de tous les Etats contractants.

Article 4

La Cour prononcera ses avis consultatifs en séance publique, après avoir procédé aux notifications nécessaires et avoir donné aux intéressés l'occasion d'être entendus, conformément aux dispositions essentielles des articles 73 et 74 actuels du Règlement de la Cour.

Article 5

En vue d'assurer que la Cour ne donne pas suite, sans le consentement des Etats-Unis, à une demande d'avis consultatif concernant une question ou un différend auquel les Etats-Unis sont ou déclarent être intéressés, le Secrétaire général avisera les Etats-Unis, par la voie indiquée par eux à cet effet, de toute proposition soumise au Conseil ou à l'Assemblée de la Société des Nations et tendant à obtenir de la Cour un avis consultatif et, ensuite, si cela est jugé désirable, il sera procédé, avec toute la rapidité possible, à un échange de vues entre le Conseil ou

an interest of the United States is affected shall proceed with all convenient speed between the Council or Assembly of the League and the United States.

Whenever a request for an advisory opinion comes to the Court, the Registrar shall notify the United States thereof, among other States mentioned in the now existing Article 73 of the Rules of Court, stating a reasonable time-limit fixed by the President within which a written statement by the United States concerning the request will be received. If for any reason no sufficient opportunity for an exchange of views upon such request should have been afforded and the United States advises the Court that the question upon which the opinion of the Court is asked is one that affects the interests of the United States, proceedings shall be stayed for a period sufficient to enable such an exchange of views between the Council or the Assembly and the United States to take place.

With regard to requesting an advisory opinion of the Court in any case covered by the preceding paragraphs, there shall be attributed to an objection of the United States the same force and effect as attaches to a vote against asking for the opinion given by a Member of the League of Nations in the Council or in the Assembly.

If, after the exchange of views provided for in paragraphs 1 and 2 of this Article, it shall appear that no agreement can be reached and the United States is not prepared to forgo its objection, the exercise of

l'Assemblée de la Société des Nations et les Etats-Unis sur la question de savoir si les intérêts des Etats-Unis sont affectés.

Lorsqu'une demande d'avis consultatif parviendra à la Cour, le Greffier en avisera les Etats-Unis en même temps que les autres Etats mentionnés à l'article 73 actuel du Règlement de la Cour en indiquant un délai raisonnable fixé par le Président pour la transmission d'un exposé écrit des Etats-Unis, concernant la demande. Si, pour une raison quelconque, l'échange de vues au sujet de ladite demande n'a pu avoir lieu dans des conditions satisfaisantes, et si les Etats-Unis avisent la Cour que la question au sujet de laquelle l'avis de la Cour est demandé est une question qui affecte les intérêts des Etats-Unis, la procédure sera suspendue pendant une période suffisante pour permettre ledit échange de vues entre le Conseil ou l'Assemblée et les Etats-Unis.

Lorsqu'il s'agira de demander à la Cour un avis consultatif dans un cas tombant sous le coup des paragraphes précédents, il sera attaché à l'opposition des Etats-Unis la même valeur que celle qui s'attache à un vote émis par un Membre de la Société des Nations au sein du Conseil ou de l'Assemblée pour s'opposer à la demande d'avis consultatif.

Si, après l'échange de vues prévu aux paragraphes 1 et 2 du présent article, il apparaît qu'on ne peut aboutir à aucun accord et que les Etats-Unis ne sont pas disposés à renoncer à leur opposition, la faculté

the powers of withdrawal provided for in Article 8 hereof will follow naturally without any imputation of unfriendliness or unwillingness to co-operate generally for peace and goodwill.

ARTICLE 6

Subject to the provisions of Article 8 below, the provisions of the present Protocol shall have the same force and effect as the provisions of the Statute of the Court and any future signature of the Protocol of December 16th, 1920, shall be deemed to be an acceptance of the provisions of the present Protocol.

ARTICLE 7

The present Protocol shall be ratified. Each State shall forward the instrument of ratification to the Secretary-General of the League of Nations, who shall inform all the other signatory States. The instruments of ratification shall be deposited in the archives of the Secretariat of the League of Nations.

The present Protocol shall come into force as soon as all States which have ratified the Protocol of December 16th, 1920, and also the United States, have deposited their ratifications.

ARTICLE 8

The United States may at any time notify the Secretary-General of the League of Nations that it withdraws its adherence to the Protocol of December 16th, 1920. The Secretary-General shall immediately communicate this notification to all the other States signatories of the Protocol.

de retrait prévue à l'article 8 s'exercera normalement, sans que cet acte puisse être interprété comme un acte inamical, ou comme un refus de coopérer à la paix et à la bonne entente générales.

Article 6

Sous réserve de ce qui sera dit à l'article 8 ci-après, les dispositions du présent Protocole auront la même force et valeur que les dispositions du Statut de la Cour et toute signature ultérieure du Protocole du 16 décembre 1920 sera réputée impliquer une acceptation des dispositions du présent Protocole.

Article 7

Le présent Protocole sera ratifié. Chaque Etat adressera l'instrument de sa ratification au Secrétaire général de la Société des Nations, par les soins duquel il en sera donné avis à tous les autres Etats signataires. Les instruments de ratification seront déposés dans les archives du Secrétariat de la Société des Nations.

Le présent Protocole entrera en vigueur dès que tous les Etats ayant ratifié le Protocole du 16 décembre 1920, ainsi que les Etats-Unis, auront déposé leur ratification.

Article 8

Les Etats-Unis pourront, en tout temps, notifier au Secrétaire général de la Société des Nations qu'ils retirent leur adhésion au Protocole du 16 décembre 1920. Le Secrétaire général donnera immédiatement communication de cette notification à tous les autres Etats signataires du Protocole.

In such case, the present Protocol shall cease to be in force as from the receipt by the Secretary-General of the notification by the United States.

On their part, each of the other Contracting States may at any time notify the Secretary-General of the League of Nations that it desires to withdraw its acceptance of the special conditions attached by the United States to its adherence to the Protocol of December 16th, 1920. The Secretary-General shall immediately give communication of this notification to each of the States signatories of the present Protocol. The present Protocol shall be considered as ceasing to be in force if and when, within one year from the date of receipt of the said notification, not less than two-thirds of the Contracting States other than the United States shall have notified the Secretary-General of the League of Nations that they desire to withdraw the above-mentioned acceptance.

DONE at Geneva, the fourteenth day of September, nineteen hundred and twenty-nine, in a single copy, of which the French and English texts shall both be authoritative.

Union of South Africa

ERIC H. LOUW

Germany

FR. GAUS

United States of America

JAY PIERREPONT MOFFAT

Australia

W. HARRISON MOORE

Austria

DR. MARCUS LEITMAIER

En pareil cas, le présent Protocole sera considéré comme ayant cessé d'être en vigueur dès réception par le Secrétaire général de la notification des Etats-Unis.

De leur côté, chacun des autres Etats contractants pourra, en tout temps notifier au Secrétaire général de la Société des Nations qu'il désire retirer son acceptation des conditions spéciales mises par les Etats-Unis à leur adhésion au Protocole du 16 décembre 1920. Le Secrétaire général donnera immédiatement communication de cette notification à tous les Etats signataires du présent Protocole. Le présent Protocole sera considéré comme ayant cessé d'être en vigueur dès que, dans un délai ne dépassant pas une année à compter de la date de la réception de la notification susdite, au moins deux tiers des Etats contractants, autres que les Etats-Unis, auront notifié au Secrétaire général de la Société des Nations qu'ils désirent retirer l'acceptation susvisée.

Fait à Genève, le quatorzième jour de septembre mil neuf cent vingt-neuf, en un seul exemplaire, dont les textes français et anglais feront également foi.

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Bolivia

A. CORTADELLAS

Brazil

M. DE PIMENTEL BRANDAO

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and all Parts of the British Em-
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